No. 91-1010-CFX
Status: GRANTED

Title: Puerto Rico Aqueduct and Sewer Authority, Petitioner
v.
Metcalf & Eddy, Inc.

Docketed:
December 23, 1991

Court: United States Court of Appeals for
the First Circuit

Counsel for petitioner: Rosen,Perry M.

Counsel for respondent: Sipkins,Peter W.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 23 1991 | G | Petition for writ of certiorari filed. |
| 3 | Jan 13 1992 | | Order extending time to file response to petition until February 21, 1992. |
| 5 | Feb 18 1992 | | Brief of respondent Metcalf & Eddy in opposition filed. |
| 4 | Feb 19 1992 | | DISTRIBUTED. March 6, 1992 |
| 6 | Feb 21 1992 | X | Reply brief of petitioner PR Aqueduct Authority filed. |
| 7 | Feb 21 1992 | X | Brief amici curiae of Ohio, et al. filed. |
| 8 | Feb 28 1992 | X | Supplemental brief of respondent Metcalf & Eddy filed. |
| 9 | Mar 9 1992 | | Petition GRANTED. |
| | | | ********** |
| 11 | Mar 13 1992 | | Order extending time to file brief of petitioner on the merits until May 7, 1992. |
| 12 | Mar 16 1992 | D | Motion of respondent for summary disposition filed. |
| 13 | Mar 23 1992 | | Opposition of Puerto Rico Aqueduct and Sewer Authority to motion of respondent Metcalf & Eddy, Inc. filed. |
| 14 | Mar 30 1992 | | Motion of respondent for summary disposition DENIED. |
| 15 | Apr 8 1992 | G | Motion of petitioner to dispense with printing the joint appendix filed. |
| 16 | Apr 27 1992 | | Motion of petitioner to dispense with printing the joint appendix GRANTED. |
| 17 | May 7 1992 | | Brief of petitioner filed. |
| 18 | May 7 1992 | | Brief amici curiae of Council of State Governments, et al. filed. |
| 19 | May 7 1992 | | Brief amici curiae of Ohio, et al. filed. |
| 21 | Jun 4 1992 | | Record filed. |
| | | * | Certified copy of proceedings U.S. Court of Appeals, First and U.S. District Court, Puerto Rico (1 Box) |
| 20 | Jun 8 1992 | | Brief of respondent Metcalf & Eddy, Inc. filed. |
| 22 | Jul 7 1992 | | Reply brief of petitioner filed. |
| 23 | Jul 14 1992 | | CIRCULATED. |
| 24 | Aug 21 1992 | | SET FOR ARGUMENT MONDAY, NOVEMBER 9, 1992. (1ST CASE). |
| 25 | Nov 10 1992 | | ARGUED |

91-1010



No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

*Petitioner,*

v.

METCALF & EDDY, INC.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In departing from the decisions of six federal courts of appeals, did the Court of Appeals for the First Circuit err in holding that it lacked jurisdiction under 28 U.S.C. § 1291 to review interlocutory orders denying claims of Eleventh Amendment immunity from suit as collateral final orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, the Puerto Rico Aqueduct and Sewer Authority, respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on September 25, 1991.

## OPINIONS BELOW

The decision of the Court of Appeals for the First Circuit holding that interlocutory orders denying Eleventh Amendment immunity claims are not immediately appealable as collateral final orders and dismissing the Petitioner's appeal for want of appellate jurisdiction is reported as *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). This decision is reprinted in Pet. App. A.

The order of the United States District Court for the District of Puerto Rico (Pieras, J.) denying the Petitioner's claim to Eleventh Amendment immunity from suit in federal court is not reported. It is reprinted in Pet. App. B.

## JURISDICTION

The Respondent and Plaintiff below, Metcalf & Eddy, Inc., asserted diversity of the parties and satisfaction of the jurisdictional amount under 28 U.S.C. § 1332(a)(1) as the sole basis for the district court's jurisdiction over the action below.

After the district court denied the Petitioner's motion to dismiss based upon Eleventh Amendment immunity from suit, the Petitioner and Defendant below, the Puerto Rico Aqueduct and Sewer Authority, appealed the order to the United States Court of Appeals for the First Circuit as a collateral final order under 28 U.S.C. § 1291. The Petitioner did not seek to certify the question for appeal under 28 U.S.C. § 1292(b). On September 25, 1991, the court of appeals entered judgment dismissing the appeal for want of jurisdiction. The Authority did not seek a rehearing.

This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).[1]

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1. This Court has authority to determine whether classes of orders denying motions to dismiss are immediately appealable as collateral final orders, irrespective of the interlocutory status of the particular order being appealed. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (interlocutory orders denying motions to dismiss based on forum selection clauses not collateral final orders); *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) (interlocutory orders denying motions to dismiss based on violations of Fed. R. Crim. P. 6(c) not collateral final orders); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (interlocutory orders denying motions to dismiss based on immunity from civil process and *forum non conveniens* not collateral final orders).



## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## STATEMENT OF THE CASE

The case below is a breach of contract action based on diversity jurisdiction. In the ongoing action in the district court, the Respondent and Plaintiff, Metcalf & Eddy, Inc. ("M&E"), a Delaware corporation, is seeking a declaration of the parties' contractual rights and monetary damages in excess of $50 million from the Petitioner and Defendant, the Puerto Rico Aqueduct and Sewer Authority ("the Authority"). There are no federal claims in the case. The substantive law of Puerto Rico applies.

### A. The Parties and Their Contract.

The Puerto Rico Aqueduct and Sewer Authority is a public corporation[2] and "an autonomous government instrumentality of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 22, § 142. The Authority provides drinking water and treats wastewater throughout Puerto Rico, a function which the Commonwealth of Puerto Rico has declared "shall be deemed and held to be an essential government function." *Id.*

As the government entity responsible for island-wide compliance with Clean Water Act standards, the Authority has been the defendant in a lengthy Clean Water Act enforcement action brought by the United States Environmental Protection Agency. Under a comprehensive consent decree entered in 1985, the Authority agreed to upgrade many of its wastewater treatment plants. In 1986, the Authority signed a contract with M&E, a private engineering firm, in which M&E agreed to direct, supervise, and manage a program to repair and rehabilitate the Authority's facilities to comply with the consent decree. Between 1986 and 1991, M&E and its subsidiary, Metcalf & Eddy de Puerto Rico, Inc.,[3] billed the Authority well over $180 million under the contract.

2. The Authority has no parent companies or subsidiary companies.

3. M&E incorporated Metcalf & Eddy de Puerto Rico, Inc., in 1989. The main place of business of the subsidiary is Puerto Rico. M&E sought (but now claims that it never obtained) the Authority's consent to assign their contract to its subsidiary in 1989. Nonetheless, M&E informed all of its subcontractors that their contracts to perform services for the Authority had been assigned from M&E to the subsidiary and M&E transferred the M&E employees who had been working on the contract to the subsidiary's payroll. From November 1989 onward, the Authority was billed for services performed by the subsidiary.



### B. The Background of the Parties' Contractual Dispute.

To answer questions about the invoices submitted under the contract, in early 1990 the Authority requested the Puerto Rico Infrastructure Financing Authority, an affiliate of the Government Development Bank of Puerto Rico (the "GDB"), to audit the invoices that M&E and its subsidiary had submitted. The GDB found numerous improper billings and unapproved expenses in the invoices. In its final audit report, the GDB determined that M&E and its subsidiary had billed the Authority $18,849,219.36 in actual questioned costs in 61 intensively audited invoices. Using statistical sampling and projection techniques, the GDB concluded that the companies had overbilled the Authority by as much as $39,988,260 in such costs in the 2,219 invoices submitted through 1989.[4]

Pending a resolution of its concerns, the Authority withheld partial payments to M&E and its subsidiary. The Authority sent M&E a draft of the GDB audit report in August 1990. Six weeks later, M&E filed suit against the Authority in the United States District Court for the District of Puerto Rico alleging breach of contract and damage to its business reputation.

### C. The Authority Asserts Its Eleventh Amendment Claim.

On February 26, 1991, the Authority filed the motion that gave rise to this appeal: a motion to dismiss based on its immunity from suit under the Eleventh Amendment to the United States Constitution.[5] In its

4. The GDB neither audited nor projected questioned costs in the approximately 1000 invoices that M&E and its subsidiary submitted to the Authority since 1989.

5. The Authority initially filed a motion to dismiss based upon a lack of diversity jurisdiction. In its original motion, the Authority argued that the assignment of the contract to M&E's subsidiary rendered the subsidiary an indispensable party. Because the main

motion, the Authority argued that as an "arm of the State" of Puerto Rico under the First Circuit's test in *Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034, 1037 (1st Cir. 1987) (seven factor "arm of the State" test), it is immune from suit in federal court.[6]

In response, M&E argued that the First Circuit had already decided that the Authority did not enjoy Eleventh Amendment immunity, citing *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), and, in the alternative, argued that the Authority was not entitled to the protection of the Eleventh Amendment under the First Circuit's "arm of the state" test.[7]

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NOTES *(Continued)*

place of business of Metcalf & Eddy de Puerto Rico, Inc., is Puerto Rico, its presence as a party would have destroyed diversity jurisdiction. In response, M&E argued that the assignment never took place and executed a document purporting to reassign all rights to payment under the contract from the subsidiary back to M&E. The district court denied the Authority's first motion to dismiss on February 13, 1991. The Authority filed a motion for Reconsideration, which was consolidated with the motion to dismiss based upon the Eleventh Amendment.

6. Within the First Circuit, the Commonwealth of Puerto Rico is treated as a state under the Eleventh Amendment. *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."); *see also Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10, 11 n.1 (1st Cir. 1991). Although immune from suit in the federal courts, the Authority invited M&E to refile the lawsuit in the courts of the Commonwealth of Puerto Rico, which the Authority acknowledges would have jurisdiction over the suit.

7. In *Paul N. Howard*, the First Circuit ruled that the Authority waived its right to claim Eleventh Amendment immunity from suit by filing counterclaims in the district court. 744 F.2d at 886. Thus, the court did not reach the merits of the Authority's claim to Eleventh Amendment immunity. In *dictum*, however, the First Circuit surmised that the Authority would not be entitled to Eleventh Amendment immunity, but specifically left the question open pending a substantive analysis. *Id.*



Approximately three years after deciding *Paul N. Howard*, the First Circuit adopted the substantive test for evaluating "arms of the state" in *Ainsworth*. Although the First Circuit has not yet applied this test to the Authority, it has applied this test to other autonomous government instrumentalities of Puerto Rico. The First Circuit has held that both the Puerto Rico Tourist Company, *In re San Juan DuPont Plaza Hotel Fire Litig.*, 888 F.2d 940 (1st Cir. 1989), and the Puerto Rico Ports Authority, *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1 (1st Cir. 1990), are "arms of the state" which enjoy immunity from suit under the Eleventh Amendment. In its motion to dismiss, the Authority demonstrated that it is indistinguishable from these entities.[8]

### D. The District Court Denies the Authority's Claim.

On May 17, 1990, the district court denied the Authority's motion to dismiss and ordered the Authority to answer the complaint. Pet. App. B. The Authority filed a timely notice of appeal with respect to the denial of its claim to Eleventh Amendment immunity from suit.

While the appeal was pending, the Authority sought to stay the district court proceedings to avoid waiving either its claim to Eleventh Amendment immunity or its counterclaims.[9] The First Circuit denied the Authority's

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8. Until the First Circuit applied its new *Ainsworth* test to the Tourism Company and the Ports Authority, the federal courts had declined to hold that they were "arms of the state" under the Eleventh Amendment. *See Ainsworth*, 818 F.2d at 1038 (test factors "point toward the conclusion that the Tourism Company is not an arm of the state"); *Canadian Transp. Co. v. Puerto Rico Ports Auth.*, 333 F. Supp.1295 (D.P.R. 1971) (Ports Authority not immune under Eleventh Amendment).

9. The lawsuit initially had placed the Authority in a procedural dilemma: the Authority could assert Eleventh Amendment immunity from the suit, or it could answer the complaint and assert counterclaims based on the millions of dollars in improper billings, but it could not do both. If, on one hand, it answered the complaint

motion for a stay, but held that the Authority had preserved its claim to Eleventh Amendment immunity in the case irrespective of whether it filed counterclaims or participated in the action below. Order (June 28, 1991), reprinted at Pet. App. C.

The Authority filed its answer and counterclaims, and has since participated in the proceedings below to the extent ordered to do so by the district court. Substantial discovery is ongoing and trial is set for May 18, 1992.

### E. The First Circuit Dismisses the Appeal.

On September 25, 1991, the Court of Appeals for the First Circuit entered judgment dismissing the Authority's appeal for want of appellate jurisdiction. *Metcalf & Eddy, Inc.*, 945 F.2d at 14. Holding that *stare decisis* required it to follow *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the First Circuit held that the Eleventh Amendment does not provide states or state entities with an "entitlement not to stand trial" in the federal courts. *Id.* at 11 n.3, 12 (citing *Libby*, 833 F.2d at 404-05, 407). The First Circuit held that the Eleventh Amendment only protects state treasuries against the enforcement of monetary judgments, an interest that " 'can be adequately vindicated upon an appeal from a final judgment. . . .' " *Id.* at 12 (quoting *Libby*, 833 F.2d at 407).

Explicitly acknowledging that its decision conflicted with the decisions of four (now six) United States Courts of Appeals, *id.* at 13 (citing conflicting cases), the court held that interlocutory orders denying claims to Eleventh Amendment immunity from suit are not appealable

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NOTES *(Continued)*

and filed counterclaims, it would have waived its claim to Eleventh Amendment immunity under *Paul N. Howard*, 744 F.2d at 886. If, on the other hand, the Authority claimed Eleventh Amendment immunity and answered the complaint without asserting its compulsory counterclaims, it could have waived its counterclaims under Fed. R. Civ. P. 13(a) – a financial risk inconsistent with its public obligations as an instrumentality of the government.



as collateral final orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Metcalf & Eddy, Inc.*, 945 F.2d at 11-12. The court declined to reach the merits of the Authority's appeal.

This appeal followed.

## REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the First Circuit directly conflicts with decisions of six other United States courts of appeals. The courts of appeals have acknowledged the conflict, which is now ripe for resolution by clear direction from this Court.

2. The First Circuit's decision directly conflicts with applicable decisions of this Court. The First Circuit erred by holding that the Eleventh Amendment does not provide states and state entities with an "entitlement not to stand trial." This holding is in direct conflict with decisions of this Court that the amendment absolutely bars the federal courts from exercising jurisdiction over unconsenting states and state entities in actions brought by private parties.

3. The decision of the First Circuit implicates federalism concerns of fundamental importance. By holding that trial must precede appellate review of a claim to Eleventh Amendment immunity, the First Circuit has expanded the jurisdiction of the federal district courts over the states, calling into question the extent and nature of state sovereign immunity within the federal system.

Neither the states' rights under the Eleventh Amendment nor the role of the federal courts in vindicating those rights should vary between the circuits. This Court should grant the petition and resolve the conflict by correcting the error of the First Circuit.

## I.
## THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF SIX UNITED STATES COURTS OF APPEALS

The United States courts of appeals have rendered conflicting decisions as to whether interlocutory orders denying claims to Eleventh Amendment immunity from suit are immediately appealable as collateral final orders. The essence of the conflict is a disagreement over whether Eleventh Amendment immunity from suit in federal court is an "entitlement not to stand trial."

### A. The Eleventh Amendment Prohibits Lawsuits Against States.

The Eleventh Amendment is an explicit limitation on the federal judicial power established in Article III of the Constitution. Characterizing the right enjoyed by the states and their agencies under the Eleventh Amendment as an "immunity from suit," this Court has repeatedly held that the Eleventh Amendment prohibits the federal courts from exercising jurisdiction over lawsuits brought by private parties against states and their agencies without their consent:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given. . . .

*Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (quoting *Ex Parte New York*, 256 U.S. 490, 497 (1921)).



### B. Six Courts of Appeals Have Held that Orders Denying Claims to Eleventh Amendment Immunity are Immediately Appealable Because they Implicate an "Entitlement Not to Stand Trial".

Six courts of appeals have recognized that claims to Eleventh Amendment immunity from suit are claims to an "entitlement not to stand trial." Because an "entitlement not to stand trial" is effectively lost if an erroneous trial occurs, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), an order denying a claim to such a right may be appealed immediately under 28 U.S.C. § 1291 as a collateral final order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[10] *Id.*

The six courts that have held that interlocutory orders denying claims to Eleventh Amendment immunity from suit are immediately appealable are the Court of Appeals for the Second Circuit, *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987); *see also Dube v. State Univ.*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); the Court of Appeals for the Fourth Circuit, *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989); the Court of Appeals for the Fifth Circuit, *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *see also Chrissy F. v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844 (5th Cir. 1991); the Court of Appeals for the Sixth Circuit, *Corporate Risk Management Corp. v. Solomon*,

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10. In *Cohen*, 337 U.S. at 546, this Court held that a small class of pre-judgment orders may be appealed immediately to the courts of appeals as collateral final orders under 28 U.S.C. § 1291. These orders must "finally determine" claims of rights that are separable from, and are collateral to the rights asserted in the action, and that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*

Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766); the Court of Appeals for the Seventh Circuit, *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, 116 L.Ed.2d 329 (1991); and the Court of Appeals for the Eleventh Circuit, *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

### C. Common Rationale of the Six Courts of Appeals.

The six courts of appeals that have accepted appellate jurisdiction over interlocutory orders denying claims to Eleventh Amendment immunity followed the rationale that this Court used in allowing immediate appeals from orders denying claims to "absolute" or "qualified" immunity.[11] This Court held that an order denying a claim to either "absolute" or "qualified" immunity is an appealable final order under *Cohen* because the essence of the claim is an "entitlement not to stand trial," a right which is finally and irretrievably lost if an erroneous trial occurs. *Mitchell*, 472 U.S. at 526 (denial of claim to "qualified" immunity appealable as collateral final order); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (order denying claim to "absolute" immunity immediately appealable as collateral final order).

Thus, the six courts of appeals held that orders denying claims to Eleventh Amendment immunity are immediately appealable as collateral final orders under *Cohen* because the essence of the claimed right to Eleventh Amendment immunity from suit is an entitlement not to stand trial. *See Minotti*, 798 F.2d at 608-09; *Coakley*, 877 F.2d at 305-06; *Loya*, 878 F.2d at 861; *Corporate Risk Management Corp.*, 1991 U.S. App.

11. "Absolute" and "qualifed" immunity protect government officers against suits that otherwise would impose liability for certain official actions.



LEXIS 15001 at *4; *Kroll*, 934 F.2d at 906-07; *Schopler*, 903 F.2d at 1377-78.

The conclusion of the six courts of appeals that an "immunity from suit" (such as that provided by the Eleventh Amendment) is an "entitlement not to stand trial" is supported by this Court's statement in *Mitchell* showing that the two are synonymous:

> At the heart of the issue before us is the question whether qualified immunity shares this essential attribute of absolute immunity – whether qualified immunity is in fact an entitlement not to stand trial under certain circumstances.
>
> . . .
>
> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

*Mitchell*, 472 U.S. at 525, 526 (emphasis in original).

The rationale of the six courts of appeals is also supported by this Court's recognition that the *Cohen* test is satisfied whenever an interlocutory order denies a claim to a "right not to be tried" that is based on the Constitution:

> It is true that deprivation of the right not to be tried satisfies the *Coopers & Lybrand [v. Livesay*, 437 U.S. 463 (1978)] requirement of being 'effectively unreviewable on appeal from a final judgment.' . . . A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur – as in the Double Jeopardy Clause . . . or the Speech and Debate Clause . . . .

*Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800-01 (1989) (citations omitted); *see also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988).

### D. The First Circuit's Decision Conflicts with the Six Courts of Appeals in its Reasoning and its Result.

In contrast to the six courts of appeals, only the First Circuit has held that Eleventh Amendment immunity from suit is not an "entitlement not to stand trial." Accordingly, only the First Circuit has held that it thus lacks jurisdiction to review interlocutory orders denying claims to Eleventh Amendment immunity from suit. *Metcalf & Eddy, Inc.*, 945 F.2d 10; *Libby*, 833 F.2d 402. The First Circuit deviated from its sister circuits both in its rationale and in the result.

#### 1. The First Circuit Rejected the View that the Eleventh Amendment Grants an "Entitlement Not to Stand Trial".

In dismissing the Authority's appeal, the First Circuit cited as controlling precedent an earlier decision that explicitly rejected the view that the Eleventh Amendment grants states and state entities an "entitlement not to stand trial:"

> We reject the proposition that the Eleventh Amendment passes the *Mitchell* litmus test, i.e., that a state's sovereign immunity is in fact an entitlement not to stand trial.

*Libby*, 833 F.2d at 405 *cited in Metcalf & Eddy, Inc.*, 945 F.2d at 11-12.

In *Libby*, the First Circuit held – without citing any supporting authority whatsoever – that the Eleventh Amendment only protects a state against monetary liability:

> The damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief. Only if the state is forced to use funds from the state treasury to satisfy a compensatory judgment do the adverse consequences that the Eleventh Amendment prohibits occur.



833 F.2d at 406.

From these premises, the First Circuit concluded that " 'the interests underlying' " the Eleventh Amendment immunity of the states " 'can be adequately vindicated upon an appeal from a final judgment.' " *Metcalf & Eddy, Inc.*, 945 F.2d at 12 (quoting *Libby*, 833 F.2d at 407). The First Circuit thus held that orders denying claims to Eleventh Amendment immunity from suit are not immediately appealable as collateral final orders under *Cohen*. *Id.* at 14.

#### 2. The Conflict Between the Circuits Exists Because the First Circuit Views *Libby* As Controlling.

The conflict between the circuits exists because the First Circuit views *Libby* as controlling precedent.

In *Libby*, the First Circuit held that it lacked jurisdiction to hear the appeal of an interlocutory order denying a claim to Eleventh Amendment immunity raised by state officials who were sued for injunctive relief under 42 U.S.C. § 1983. In Section 1983 cases, however, the Eleventh Amendment does not bar suits seeking injunctive relief against state officials for unconstitutional acts. *Ex Parte Young*, 209 U.S. 123 (1908). This Court has recognized that Section 1983 cases against state officials are a unique exception to the otherwise absolute prohibition of the Eleventh Amendment – an exception that is necessary to insure the supremacy of federal law. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985).

However accurate the First Circuit's analysis of Eleventh Amendment interests may be in the context of Section 1983 cases when trial must occur, the First Circuit did not limit the holding or the rationale of *Libby* to such cases:

> To posit . . . that the essence of sovereign immunity is an immunity from trial itself, is to overlook the reality of the *Ex Parte Young* exception to the Eleventh Amendment. . . . [B]ecause of *Ex*

> *Parte Young*, a state has to "stand trial" whenever a *Young* type case – a suit against an official in his official capacity to remedy a violation of federal law – is brought against it. . . . Since the state is subjected to this not inconsiderable burden in a *Young* action, it cannot be convincingly argued that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial.

833 F.2d at 406.[12]

In the current view of the First Circuit, the Eleventh Amendment does not grant states or state entities an entitlement to be free of trial in federal court.[13]

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12. In the judgment being appealed, the First Circuit explicitly rejected an invitation to limit *Libby* to Section 1983 actions. *Metcalf & Eddy, Inc.*, 945 F.2d at 12 n.4 ("[The Authority] argues that *Libby* is somehow different because Libby's suit was premised on a federal statute, 42 U.S.C. § 1983 (1988), *see Libby*, 833 F.2d at 403, whereas the instant suit is founded upon diversity jurisdiction. We reject the asseveration.").

13. On previous occasions, the First Circuit – and the author of the decision being appealed – recognized that the Eleventh Amendment prohibits the federal courts from entertaining certain lawsuits against states and state entities. *See, e.g, Lane v. First Nat'l Bank*, 871 F.2d 166, 173 (1st Cir. 1989) (Selya, J.) ("If the Eleventh Amendment holds sway,.suit cannot be brought in federal court against an infringing State. . . ."); *Ramirez*, 715 F.2d at 697 (Selya, J., sitting by designation) ("The Eleventh Amendment stands as a palladium of sovereign immunity. It bars federal court lawsuits by private parties insofar as they attempt to impose liability necessarily payable from public coffers. . . ."). The First Circuit did not distinguish these holdings either in *Libby* or in the decision being appealed.



## II.
## THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The decision of the First Circuit conflicts with applicable decisions of this Court holding that the Eleventh Amendment prohibits suits against states and state entities brought by private parties. The decision also conflicts with the recent decisions of this Court recognizing the distinction between immunity from suit and immunity from liability. Finally, the judgment conflicts with this Court's decisions construing the history and purpose of the amendment.

### A. The First Circuit's View of the Eleventh Amendment Conflicts with Decisions of This Court Construing the Eleventh Amendment.

The First Circuit's view that the Eleventh Amendment does not provide unconsenting states and state entities with an "entitlement not to stand trial" in the federal courts conflicts with this Court's repeated expressions to the contrary. See, e.g., *Hafer v. Melo*, 112 S. Ct. 358, 364 (1991) ("[T]he Eleventh Amendment bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds . . . .' ") (citation omitted); *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990) ("The defendant in *Hill* was a state agency protected from suit in federal court by the Eleventh Amendment.") (citations omitted, footnote omitted); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) ("[T]he States' Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would otherwise bar these actions. . . ."); *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) ("States' constitutionally secured immunity from suit" can be abrogated by Congress only with unmistakable clarity); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989) ("[T]he Eleventh Amendment

rendered the States immune from suits for monetary damages in federal court even where jurisdiction was premised on the presence of a federal question."); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479-93 (1987) (explicating constitutional and historical foundation of state sovereign immunity from suit); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982) ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity.") (citation omitted); *Pennhurst*, 465 U.S. at 100 ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.") (citations omitted); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment.").[14]

### B. The First Circuit's Judgment Conflicts with Decisions of this Court Holding that *Ex Parte Young* did not Abridge the Eleventh Amendment.

The First Circuit's holding that after *Ex Parte Young* the Eleventh Amendment no longer provides the states with an "entitlement not to stand trial," *Libby*, 833 F.2d

14. Although the history, theoretical basis, relevance, nature and scope of the Eleventh Amendment has been the subject of debate among members of this Court, *see, e.g., Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2586 (1991) (Blackmun, J., dissenting) (citing cases), there has always been complete agreement that the Eleventh Amendment prohibits the federal courts from entertaining diversity actions brought by individuals against unconsenting states and state agencies. *See, e.g., Port Auth. Trans-Hudson v. Feeney*, 110 S. Ct. 1868, 1875 (1990) (Brennan, J., dissenting) ("[T]he Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity.").



at 406, conflicts with decisions of this Court to the contrary. This Court has repeatedly held that *Ex Parte Young* made a narrow exception to the Eleventh Amendment's otherwise blanket prohibition of suits against states, and has held that the general prohibition is still the general rule:

> Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. The landmark case of *Ex Parte Young* . . . created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law *is not one against the State*.

*Green*, 474 U.S. at 68 (citations omitted; emphasis added). *See also Pennhurst*, 465 U.S. at 105 ("[T]he need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States."); *Pugh*, 438 U.S. at 782 ("There can be no doubt, however, that [this Section 1983] suit against the State and its Board of Corrections is barred by the Eleventh Amendment.").

### C. The First Circuit's Decision Conflicts with This Court's Decisions Differentiating Between Immunity from Suit and Immunity from Liability.

The First Circuit's holding that the Eleventh Amendment only protects states and state agencies with an immunity against the enforcement of monetary liability conflicts with this Court's recent cases distinguishing between immunities from suit and immunities from liability.

In *Lauro Lines*, this Court reaffirmed its earlier decisions that an interlocutory order denying a claim to an "immunity from suit" may be appealed as a collateral

final order. 490 U.S. at 500. In holding that the denial of a motion to dismiss based on a contractual forum selection clause did not involve an "immunity from suit," this Court distinguished between "an entitlement to avoid suit" and "an entitlement to be sued only in a particular forum." *Id.* at 501. Unless "an essential aspect of the claim is the right to be free from the burdens of a trial," *Van Cauwenberghe*, 486 U.S. at 525, an order denying a motion to dismiss is not immediately appealable. *Id.* at 526.

The First Circuit's decision misapplies this distinction. Unlike the contractual right granted by a forum selection clause, it is beyond dispute that an "essential aspect" of a constitutional claim to Eleventh Amendment immunity of a state agency is "the right to be free from the burdens of a trial in the federal courts." *See Treasure Salvors*, 458 U.S. at 684 ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity.") (citation omitted); *see also Mitchell*, 472 U.S. at 525 ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

Thus, even though Puerto Rico has allowed the Authority to be sued in the courts of the Commonwealth, P.R. Laws Ann. tit. 22, § 144(c), the Authority is still entitled to claim immunity from suit in federal court under the Eleventh Amendment's constitutional guarantee that trial will not occur in the federal courts. *See, e.g., Pennhurst*, 465 U.S. at 99 n.9 (this "Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.") (citing *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam)); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).



### D. The Decision of the First Circuit Conflicts with Decisions of This Court Construing the History and Purpose of the Amendment.

The decision of the First Circuit holding that the Eleventh Amendment does not bar suits in federal courts conflicts with decisions of this Court construing the history, nature, and purpose of the Amendment. This Court repeatedly has held that the Eleventh Amendment was proposed and ratified to overturn a specific Supreme Court decision that would have permitted the federal courts to entertain such suits.

As this Court has noted, during the debates prior to the ratification of the United States Constitution, the belief prevailed that the judicial power granted in Article III, § 2 (power extends to " 'controversies . . . between a State and Citizens of another State' ") did not encompass suits in which states were unwilling defendants in the federal courts. *See Welch*, 483 U.S. at 479-80 (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973)). In 1793, however, a holder of Revolutionary War bonds sued the State of Georgia in this Court to recover on the bonds. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court interpreted the language of Article III, § 2 literally, and held that the private plaintiff could sue the State of Georgia. The Eleventh Amendment was immediately proposed and was ratified both to nullify *Chisholm* and to restore the original understanding that state sovereign immunity precluded the states from becoming unwilling defendants in the federal courts. *Welch*, 483 U.S. at 480 (citing *Employees*, 411 U.S. at 291-92 (Marshall, J., concurring)).

The Eleventh Amendment "embodies a broad constitutional principle of sovereign immunity" which limits the grant of judicial authority contained in Article III. *Id.* at 486. Thus, while the United States may sue states (because that is inherent in the constitutional plan) and

while states may sue other states (because the permanence of the Union otherwise might be endangered), the Eleventh Amendment "established 'an absolute bar' to suits by citizens of other States or foreign states." *Id.* at 487 (citations omitted).

Overlooking the history and specific purpose of the Eleventh Amendment, the decision being appealed cites as controlling authority a decision that limits the Eleventh Amendment to the protection of states against the enforcement of monetary judgments. *Metcalf & Eddy, Inc.*, 945 F.2d at 12 (citing *Libby*, 833 F.2d at 404-07). This view explicitly has been rejected by this Court:

> *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

*Cory v. White*, 457 U.S. 85, 90-91 (1982).

## III.
## THIS APPEAL PRESENTS FEDERALISM QUESTIONS OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE

This appeal presents important questions of federal-state relations and of the proper role of the federal appellate courts in vindicating states' interests guaranteed by the Eleventh Amendment.

In numerous cases this Court has acknowledged the Eleventh Amendment's role as " 'an essential component of our constitutional structure,' " *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2585 (1991)



(quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)), and the " 'vital role of the doctrine of sovereign immunity in our federal system.' " *Welch*, 483 U.S. at 474 (quoting *Pennhurst*, 465 U.S. at 99). In holding that the Eleventh Amendment does not shield states and their agencies with an "entitlement not to stand trial," the decision being appealed distorts the Eleventh Amendment's role by altering the balance of power between the states and the federal government and its courts.

An essential component of the federal-state balance of power is that the states and their agencies cannot be forced to submit to the jurisdiction of the federal courts for an adjudication of their rights and obligations.[15] States may choose not to submit to any court for the adjudication of such claims, or they may designate their own courts as the sole forum for the resolution of such claims. *See Pennhurst*, 465 U.S. at 99 ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." (footnote omitted)).

On several occasions, this Court has described the essential role that the federal courts play in insuring that this balance of power is preserved and protected. Thus, for example, this Court has required an extraordinarily clear expression of state intent to waive this immunity, *see Edelman*, 415 U.S. at 673, and a similarly clear expression of congressional intent to abrogate the states' Eleventh Amendment immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 75 (1989) (Brennan, J., dissenting) ("Where the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other

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15. Madison, Hamilton, and Marshall represented during the ratification debates that the Constitution would *not* abrogate the states' sovereign immunity from suit in the federal courts. This Court has noted that those representations "may have been essential to ratification." *Welch*, 483 U.S. at 483 (footnote omitted).

situation."). The federal courts are required carefully to guard against expansion of their jurisdiction in this traditionally sensitive area. *Welch*, 483 U.S. at 474 (" 'The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.' " (quoting *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17 (1951)).

## SUGGESTION FOR SUMMARY DISPOSITION

Because the decision of the Court of Appeals for the First Circuit is clearly erroneous in light of controlling decisions of this Court, and because the facts relevant to this Court's disposition of this jurisdictional question are not in dispute, the Petitioner respectfully suggests that summary disposition of this appeal may be appropriate under Supreme Court Rule 23.1, as in similar cases in the recent past. *See, e.g., Florida Nursing Home Ass'n*, 450 U.S. 147 (per curiam) (certiorari granted as to whether state had waived Eleventh Amendment immunity); *Pugh*, 438 U.S. 781 (per curiam) (certiorari granted with respect to whether suit against state and state prison agency was barred by Eleventh Amendment); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam) (certiorari granted with respect to whether order denying motion to dismiss based on assertion of prosecutorial vindictiveness is collateral final order).



## CONCLUSION

To resolve a direct conflict between the circuits on this important issue of federalism and to restore the proper role of the federal appellate courts in vindicating the right guaranteed by the Eleventh Amendment of state sovereign immunity from suit in the federal courts, this Court should grant the Petition and reverse the error of the First Circuit.

Respectfully submitted on
December 23, 1991

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# APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 91-1602

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METCALF & EDDY, INC.
*Plaintiff, Appellee,*

*v.*

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Defendants, Appellant.*

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**APPEAL FROM THE**
**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF PUERTO RICO**

[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

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Before Breyer, *Chief Judge,*

Aldrich and Selya, *Circuit Judges.*

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*Michael T. Brady* with whom *Paige E. Reffe, Perry M. Rosen, Cutler & Stanfield, Arturo Trias, Hector Melendez Cano,* and *Trias, Acevedo & Otero,* were on brief for appellant.

*Peter W. Sipkins* with whom *Dorsey & Whitney, Jay A. Garcia-Gregory,* and *Fiddler, Gonzalez & Rodriguez* were on brief for appellee.

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**September 25, 1991**

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Petitioner's Appendix A

SELYA, *Circuit Judge.* We recently acknowledged that "words can be 'chameleons, which reflect the color of their environment.' " *Hanover Ins. Co. v. United States,* 880 F.2d 1503, 1504 (1st Cir. 1989) (quoting *Commissioner v. National Carbide Co.,* 167 F.2d 304, 306 (2d Cir. 1948) (L. Hand, J.)), *cert. denied,* 110 S. Ct. 726 (1990). As the appeal before us illustrates, "immunity" is such a word.

## I. BACKGROUND

The Puerto Rico Aqueduct and Sewer Authority (PRASA) was established by the Puerto Rico legislature as "a public corporation and an autonomous government instrumentality." 22 L.P.R.A. § 142 (1987). Its purpose was "to provide to the inhabitants of Puerto Rico . . . adequate drinking water, sanitary sewage service and any other service or facility proper or incidental thereto." *Id.* § 144. In 1985, PRASA and the United States Environmental Protection Agency signed a consent decree which, as later supplemented, required PRASA to bring eighty-three of its facilities into compliance with federal "clean water" standards.

In March 1986, PRASA entered into a contract with Metcalf & Eddy, Inc. (Metcalf), an engineering firm, to provide extensive services anent the subject matter of the consent decree. By late 1990, the relationship had soured. Invoking diversity jurisdiction, 28 U.S.C. § 1332(a) (1988), Metcalf sued PRASA in Puerto Rico's federal district court. Metcalf's suit sought a declaration of rights with respect to the PRASA/Metcalf agreement along with $52,000,000 in damages for breach of contract.

PRASA mounted a furious campaign to avoid joining issue. Its initial motion to dismiss was denied. It then moved to dismiss on the basis of Eleventh Amendment immunity.[1] The district court denied the motion on May

1. The Eleventh Amendment provides in pertinent part that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. IX. It is settled that Puerto Rico is to be treated as a state for Eleventh Amendment purposes. *See, e.g., DeLeon Lopez v. Corporacion Insular de Seguros,* 931 F.2d 116, 121 (1st Cir. 1991); *Ramirez v. Puerto Rico Fire Serv.,* 715 F.2d 694, 697 (1st Cir. 1983).



17, 1991. PRASA appeals from the denial of this motion.[2]

## II. APPELLATE JURISDICTION

We begin and end our consideration of this appeal by addressing the threshold question of appellate jurisdiction.

*A. Existence of Circuit Precedent*

PRASA's appeal hinges, in the first instance, on whether it is properly before us at this early date. Ordinarily, apart from injunctions and other special circumstances, *see, e.g.,* 28 U.S.C. § 1292(a)-(c) (1988), federal appellate courts lack jurisdiction, prior to the entry of final judgment in a given case, to hear appeals from interim trial-court orders. *See* 28 U.S.C. § 1291 (1988). There is, of course, an exception for interlocutory rulings which meet the rigorous collateral-order standards first enunciated by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 545-47 (1949). PRASA contends that its appeal fits within *Cohen's* contours because the Eleventh Amendment renders PRASA "immune" from suit in a federal forum. Thus, PRASA says that the district court's refusal to credit its immunity defense should be reviewable forthwith. In support of its position, PRASA cites a line of cases capped by *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Mitchell holds that interlocutory orders denying state officials the benefit of colorable "qualified immu-

2. In addition to a timely notice of appeal, PRASA also filed a flurry of motions in the district court and in this court seeking to stay the proceedings until its appeal could be heard and determined. No such stay is in effect.

nity" defenses are immediately appealable. *See id.* at 526-27.[3]

The problem with PRASA's position is that the qualified immunity defense available to individual state actors is not, from either a conceptual or a practical standpoint, congruent with the Eleventh Amendment defense available to unconsenting states and state agencies. We said as much in *Libby v. Marshall,* 833 F.2d 402, 404-07 (1st Cir. 1987). There, certain Massachusetts state employees, sued in their official capacities, moved to dismiss on the basis of an asserted Eleventh Amendment immunity. The district court denied their motion. The officials essayed an immediate appeal. After a carefully reasoned analysis of the question, fully considering the *Mitchell* line of qualified immunity cases, see *Libby*, 833 F.2d at 404-05, a panel of this court concluded that "because the interests underlying the immunity the Eleventh Amendment provides to the states can be adequately vindicated upon an appeal from a final judgment . . . the district court's decision [denying the defendants' motion to dismiss was] not a collateral order." *Id.* at 407. Hence, there was no appellate jurisdiction. *Id. Libby* must shape our consideration of PRASA's appeal.[4]

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3. To be sure, other denials of immunity have also been held to be immediately appealable – but these immunities, like qualified immunity, have been personal in nature, comprising an absolute entitlement not to stand trail under given circumstances. *See, e.g., Helstoski v. Meanor,* 442 U.S. 500 (1979) (congressman's immunity under Speech and Debate Clause); *Abney v. United States,* 431 U.S. 651 (1977) (accused's right not to be put twice in jeopardy).

4. PRASA argues that *Libby* is somehow different because Libby's suit was premised on a federal statute, 42 U.S.C. § 1983 (1988), *see Libby,* 833 F.2d at 403, whereas the instant suit is founded upon diversity jurisdiction. We reject the asseveration. It is well settled that an Eleventh Amendment defense, where otherwise applicable, can be asserted in federal question cases as well as in diversity cases. *See, e.g., Edelman v. Jordan,* 415 U.S. 651, 671-74 (1974); *Dube v. State Univ. of N.Y.,* 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2814 (1991).



*B. Effect of Circuit Precedent*

Finding, as we do, that *Libby v. Marshall* applies to this appeal, the lens of our inquiry narrows considerably. We have held, with a regularity bordering on the monotonous, that in a multi-panel circuit, newly constituted panels are, by and large, bound by prior panel decisions closely in point. *See, e.g., United States v. Wogan,* ____F.2d ____, ____(1st Cir. 1991) [No. 91-1214, slip op. at 8]; *Kotler v. American Tobacco Co.,* 926 F.2d 1217, 1223 (1st Cir. 1990), *petition for cert. filed* (U.S. March 19, 1991) (No. 90-1473); *Jusino v. Zayas,* 875 F.2d 986, 993 (1st Cir. 1989); *Lacy v. Gardino,* 791 F.2d 980, 985 (1st Cir.), *cert. denied,* 479 U.S. 888 (1986). The orderly development of the law, the need for stability, the value of results being predictable over time, and the importance of evenhanded justice all counsel continue fidelity to this principle.

Of course, there is a two-tiered exception to the rule. The exception has been described in varying terms. We visualize the top tier as becoming operative when, after a panel decision issues, the decision is undercut by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling. *See, e.g., United States v. Bucuvalas,* 909 F.2d 593, 594 (1st Cir. 1990) (overruling *United States v. Bosch Morales,* 677 F.2d (1st Cir. 1982), in light of *United States v. Powell,* 469 U.S. 57 (1984)); *Unwin v. Campbell,* 863 F.2d 124, 128 (1st Cir. 1988) (overruling in part *Bonitz v. Fair,* 804 F.2d 164 (1st Cir. 1986), in light of *Anderson v. Creighton,* 483 U.S. 635 (1987)); *cf. State of Cal., Dep't of Health Serv. v. United States Dep't of HHS,* 853 F.2d 634, 638-39 (9th Cir. 1988) (refusing to abandon previous decision because language of intervening statutory change, read in context, did not require different result). We foresee the exception's remaining tier as coming into play in those few instances in which newly emergent

authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course. *See generally United States v. Connor*, 926 F.2d 81, 83 (1st Cir. 1991) (suggesting that *stare decisis* need not always be applied woodenly, especially where new matters are brought to the court's attention); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (discussing "complex relationship . . . between a court and its own previous decisions"); *cf. Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value."), *cert. denied*, 446 U.S. 919 (1980). In leaving the door to this second tier ajar, however, we emphasize that only the most persuasive showing of collateral authority is likely to possess the power to push the door fully open.

PRASA's argument for overruling *Libby* seeks to take advantage of both aspects of the stated exception. PRASA contends, first, that the Court's decision in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), demands that we abandon our earlier precedent. This contention rests on the appellant's Panglossian reading of *Midland Asphalt* — a reading fueled more by wishful thinking that by legal insights. In *Midland Asphalt*, the Court determined that the denial of a criminal defendant's pretrial motion to dismiss an indictment on account of an alleged violation of Fed. R. Crim. P. 6(e)(2) was not immediately appealable under the collateral-order exception to the final judgment rule.[5] *Id.* at 798-802. Fairly read, the reasoning of *Midland Asphalt* fails to undermine *Libby* in the slightest degree. Indeed, the Court's admonition that litigants seeking to

5. In material part, Fed. R. Crim. P. 6(e)(2) prohibits public disclosure by prosecutors of "matters occurring before the grand jury" except in certain narrowly defined circumstances.



justify interlocutory appeals "must be careful . . . not to play word games with the concept of a 'right not to be tried,' " *id.* at 801, is a warning which PRASA could well have heeded.

The appellant's second salvo is better aimed, but still wide of the mark. Cases from four of our sister circuits hold, contrary to *Libby*, that denials of Eleventh Amendment immunity claims are immediately appealable. *See Kroll v. Board of Trustees of Univ. of Ill.*, 934 F.2d 904, 906 (7th Cir. 1991); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied*, 110 S. Ct. 501 (1989); *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987). Citing some of these cases, PRASA contends that a tide of emerging authority has engulfed *Libby*, rendering it unworthy of continued deference. We disagree.

*Minotti*, a case decided prior to *Libby*, was fully considered by the *Libby* panel, *see Libby*, 833 F.2d at 405, and was convincingly rejected. Thus, *Minotti* and the Second Circuit precedents which rest upon it, *see, e.g., Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2814 (1991), are entitled to no weight as a basis for possible departure from the *Libby* precedent. *Loya* and *Coakley* are horses of a different hue. Both were decided subsequent to *Libby*. Yet, neither opinion offers any meaningful discussion of the pivotal issue; and neither opinion cites *Libby* or addresses its rationale. *Kroll* cites *Libby*, but does not confront its reasoning and advances no cogent analysis to contradict it.

While decisions of other courts of appeals merit our respectful consideration, they are not entitled to our automatic acquiescence. In the end, such decisions should receive deference commensurate with their intrinsic persuasive force (or lack thereof). When, as in this situation, we are asked to overrule a recent, carefully reasoned precedent of our court on the basis of

largely conclusory statements from another court or courts, we should be slow to do so.

In sum, the cases relied upon by PRASA lack the strong persuasiveness needed to change our course. Bluntly put, those cases comprise a trickle rather than a tide. There is simply no principled way that we can jettison *Libby* on so speculative a showing.

## III. CONCLUSION

We need go no further. The word "immunity" does not have the talsmanic significance that PRASA attaches to it; and the mere incantation of the term, without reference to the nature and type of immunity involved, does not confer a right to an immediate appeal. Because this case involves a claim of Eleventh Amendment immunity, it comes within the precedential sweep of *Libby* v. *Marshall,* 833 F.2d 402. *Libby* remains unsullied by the passage of time or the march of persuasive authority. Applying binding precedent, as we must, we hold that the district court's denial of a government agency's motion to dismiss premised on Eleventh Amendment grounds is not an immediately appealable order.[6]

*The appeal is dismissed for want of appellate jurisdiction. Costs shall be taxed in favor of the appellee.*

6. Since we have no jurisdiction over this interlocutory appeal, we do not consider the merits of PRASA's Eleventh Amendment defense and take no view as to whether PRASA is actually entitled to the claimed immunity. That issue is effectively reviewable at the proper time and on the proper record, in the form of an end-of-case appeal prosecuted in the ordinary course.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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CIVIL NO. 90-2261 (JP)

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METCALF & EDDY, INC.

*Plaintiff*

*v.*

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

*Defendant*

## ORDER

The Court has before it defendant's Motion for Reconsideration and for Dismissal Under the 11th Amendment to The United States Constitution. The defendant's motion must be denied for the following reasons. Without submission to the Court of a copy of the alleged assignment contract between the plaintiff and its subsidiary, the Court cannot make a finding that the subsidiary is an indispensable party to this action. Fed. R. Civ. P. 19. When a plaintiff brings an action for satisfaction of a contract, it is presumed that it holds the rights to that contract. The defendant has not submitted compelling evidence to the Court which rebuts this presumption. In addition, the defendant is not entitled to Eleventh Immunity in this case because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds. *Mt. Healthy City Bd. of Educ. v. Doyle,* 439 U.S. 274 (1977).

Sanctions will not be imposed upon the defendant for filing of its Motion for Reconsideration, because sanctions should not be imposed for raising serious challenges to subject matter jurisdiction as permitted by the Federal Rules of Civil Procedure. The defendant is

hereby ORDERED to file its answer to the complaint within 20 days of this Order.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 17th day of May, 1991.

/s/

JAIME PIERAS, JR.
U. S. DISTRICT JUDGE



UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Misc. No. 91-8042

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METCALF & EDDY, INC.,
*Plaintiff, Appellee,*

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Defendant, Appellant.*

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Before

Selya, *Circuit Judge,*
Bownes, *Senior Circuit Judge,*
and Cyr, *Circuit Judge.*

**ORDER OF COURT**

Entered June 28, 1991

Appellee Metcalf & Eddy, Inc.'s ("Metcalf") motion to dismiss appeal is *denied* without prejudice. This denial does not, however, constitute a ruling that this court has jurisdiction over this appeal. The parties shall argue the issue of this court's appellate jurisdiction in their briefs on appeal.

The emergency application for stay of proceedings pending appeal filed by appellant Puerto Rico Aqueduct and Sewer Authority ("PRASA") is *denied.* We cannot say, at this preliminary stage, that PRASA has demonstrated a probability of success on the merits of either the appealability issue or the issue of Eleventh Amendment immunity. Although *Libby v. Marshall,* 833 F.2d 402 (1st Cir. 1987), did involve a suit naming state

officials as defendants, not a state or a state agency, our decision in *Libby* declined to permit an interlocutory appeal because "any immunity enjoyed and any liability risked belong to the state, not to the named defendants as individuals[,]" so that "the concerns . . . as to the pernicious consequences of lawsuits against public officials – inhibiting officials' discretion, distracting them from their duties, deterring people from entering public service – are largely irrelevant." *Id.* at 405. It would seem at first glance, therefore, that the rationale of *Libby* would apply to a suit against a state agency. Furthermore, we stated in *Paul N. Howard Co. v. Puerto Rico Aqueduct and Sewer Authority*, 744 F.2d 880, 886 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), that "[w]e doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment." Although this comment was dictum, the doubt expressed on that occasion still lingers. And, it is a substantial doubt.

In addition, PRASA has not demonstrated that it will suffer irreparable injury if the district court proceedings are not stayed. If, indeed, *Libby* governs this case, then any Eleventh Amendment immunity PRASA might enjoy is not "an entitlement not to stand trial." *Libby, supra*, 833 F.2d at 402. Accordingly, PRASA suffers no cognizable irreparable injury by virtue of mere participation in district court proceedings. Furthermore, since Metcalf has offered to stipulate that PRASA's filing of an answer and any counterclaims will not be deemed to constitute a waiver of any Eleventh Amendment immunity enjoyed by PRASA (a concession which we direct Metcalf to place forthwith on the district court record), PRASA need not fear that it will waive any immunity by further participation in the district court proceedings. PRASA has given no adequate reason to doubt that such a stipulation would not be effective. In any case, since PRASA has promptly raised and maintained its claim of Eleventh Amendment immunity, we doubt that PRASA



would be held to have waived any immunity by participation in the district court proceedings or by the filing of compulsory counterclaims. *Cf. Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233 n.2 (1st Cir. 1991) (continued participation in lawsuit, including pursuit of a counterclaim, did not constitute voluntary submission to court's jurisdiction waiving stated objections to personal jurisdiction).

Appellee's motion to dismiss the appeal is *denied* without prejudice. Appellant's emergency application for a stay of proceedings pending appeal is *denied*. Proceedings in this appeal shall be expedited, as follows. Appellant shall serve and file its brief on appeal on or before 5 p.m. on July 29, 1991. Appellee shall serve and file its brief on appeal on or before 5 p.m. on August 23, 1991. Appellant shall serve and file its reply brief on or before 5 p.m. on August 30, 1991.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: /s/
Chief Deputy Clerk

(2)

No. 91-1010



IN THE

# Supreme Court of the United States

October Term, 1991

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PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Petitioner,*

v.

METCALF & EDDY, INC.,
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals for the First Circuit correctly dismissed for want of jurisdiction an appeal from an interlocutory order denying summary judgment on a claim of Eleventh Amendment immunity raised by a Puerto Rican public corporation, where the merits of the claim could not be determined, at least in its favor, solely as a matter of law.

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
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---

## BRIEF IN OPPOSITION

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Respondent, Metcalf & Eddy, Inc. ("M&E"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the First Circuit's decision in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). The First Circuit properly dismissed for want of jurisdiction an appeal from an interlocutory order denying summary judgment on a claim of Eleventh Amendment immunity raised by a Puerto Rican public corporation. The First Circuit's decision is in accord

with the decisions of the other courts of appeals; when faced with a claim of Eleventh Amendment immunity that could not be determined, at least in the movant's favor, solely as a matter of law, all other courts of appeals have similarly denied interlocutory review. When viewed in the full light of its particular circumstances, this case does not suitably present an issue warranting this Court's review.

## JURISDICTIONAL STATEMENT

The district court denied the motion for summary judgment on a claim of Eleventh Amendment immunity brought by the Puerto Rico Aqueduct and Sewer Authority ("PRASA"), petitioner herein, on May 17, 1991. The First Circuit dismissed PRASA's appeal for want of jurisdiction on September 25, 1991. Pet. App. A-8. PRASA filed its petition for a writ of certiorari on December 23, 1991.

## STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, M&E draws the Court's attention to certain relevant factual errors and omissions in the petition.

### I.

### PARTIES TO THIS CASE

M&E is a corporation[1] internationally renowned for its expertise in wastewater treatment. C.A. App. 4-5. It has provided project management services to various federal, state and private entities, as well as to public corporations operating as private enterprises, such as PRASA. *Id.* 5.

[1]Pursuant to Supreme Court Rule 29.1, respondent states that Metcalf & Eddy Companies Inc. is the parent company of Metcalf & Eddy, Inc. and Air & Water Technologies Corp. is the parent company of Metcalf & Eddy Companies Inc.



PRASA is a public corporation, separately incorporated under Puerto Rican law. *Id.* 5. It is not subject to the general laws governing the administration of the Commonwealth of Puerto Rico, but is responsible for its own administration. It is "autonomous" and has "complete control and supervision of its properties and activities." P. R. Laws Ann. tit. 22 §§ 142, 144(j) (1988). PRASA is obligated to fix its rates and charges so as to fund, with a safety margin, the maintenance, repair and operation of its water and sewer systems. *Id.*, § 158. It may borrow money, issue revenue bonds, and make contracts. *Id.*, §§ 144(d), 144(g). It has the power to sue and be sued in its own corporate name. *Id.*, § 144(c). PRASA is prohibited from pledging the credit or the taxing power of the Commonwealth. *Id.*, § 144. Most importantly, by statute, PRASA's obligations are not debts of the Commonwealth and must be paid out of PRASA's funds. *Id.*; *see also* C.A. App. 65 (PRASA bond prospectus representing that bonds are not debts of the Commonwealth).

The courts of the Commonwealth of Puerto Rico have consistently treated PRASA as a private enterprise separate and distinct from the Commonwealth government. The Supreme Court of Puerto Rico has concluded that PRASA was "unquestionably framed as a private enterprise or business and in fact operates as such." *A.A.A. v. Union de Empleados A.A.A.*, 105 P.R. Dec. 437, 456-57, 5 O.T. 602, 628 (1976). In reaching this conclusion, the Supreme Court considered the statutory provisions creating PRASA and noted that PRASA "enjoys an extraordinary fiscal and administrative autonomy. Its structure, as well as its powers and authorities, are basically similar to those of a private enterprise." 105 P.R. Dec. at 456, 5 O.T. at 627. It concluded that an "overwhelming combination of factors [lead]

to the conclusion that [PRASA] operates as a private enterprise or business." 105 P.R. Dec. at 457, 5 O.T. at 629; *see also Canchani v. C.R.U.V.*, 105 P.R. Dec. 352, 356-57, 5 O.T. 485, 489-90 (1976) (PRASA has "judicial personality *independent* of the Commonwealth of Puerto Rico") (emphasis in original); *Arraiza v. Reyes*, 70 P.R.R. 583, 586-87 (1949) (collecting evidence of PRASA's autonomy and concluding "the Legislature clearly indicated its intention to the effect that this authority would be as amenable to judicial process as any private enterprise would be under like circumstances").

## II.

## BACKGROUND TO THIS SUIT

The contractual relationship between M&E and PRASA grew out of an enforcement action brought against PRASA by the United States Environmental Protection Agency ("EPA"). In 1985, the EPA suit culminated in a Consent Order (modified in 1988) that, among other things, imposed a rigorous schedule of improvements to PRASA's eighty-three existing wastewater treatment plants and restricted additional sewage connections to thirty-eight of these plants. C.A. App. 6-7.

In March 1986, PRASA negotiated and contracted with M&E for project management services for the Consent Order's rehabilitation work. *Id.* 9. M&E immediately began providing those project management services. *Id.* 10. Over the next several years, M&E successfully met the deadlines established in the EPA Consent Order. *Id.* 11-12. PRASA has claimed no defects in M&E's workmanship, in the equipment supplied by M&E, or in the workmanship of Puerto Rican subcontractors hired and paid directly by



M&E. M&E commenced this suit when PRASA failed to pay M&E over $37 million for services rendered, for monies M&E advanced to Puerto Rican subcontractors, and for equipment purchased for PRASA under the contract. *Id.* 13.[2] M&E has also claimed damages to its business reputation in excess of $10 million. *Id.* 18.

## III.

## PROCEDURAL HISTORY OF THIS SUIT

After M&E commenced suit in September, 1990, PRASA initially moved to dismiss on the sole ground that M&E had failed to join an indispensable party. The district court denied that motion. In February 1991, PRASA moved for reconsideration and also for dismissal on the new ground that it was immune from suit under the Eleventh Amendment. In an attempt to overcome the statutory and case law against its position, PRASA submitted affidavits and documents to the district court, alleging certain facts regarding its operations. *Id.* 37-140. These were controverted by an affidavit and document submitted by M&E. *Id.* 162-65. The district court denied PRASA's motion for reconsideration and dismissal. Pet. App. A-9.

In June, 1991, PRASA appealed from that part of the Order denying its motion to dismiss on the ground of a

[2] Part B of PRASA's Statement of the Case is not relevant to the Court's consideration of the petition. Moreover, Part B is unsupported by any citations to the record and does not fairly explain the facts underlying the parties' dispute. PRASA had conducted two internal audits of the agreement in 1987, both of which concluded that M&E's invoices and billing practices were proper. C.A. App. 16 (M&E's Amended Complaint). The audit by the Puerto Rico Infrastructure Financing Authority in 1990 was not conducted in accordance with generally accepted auditing principles and used improper statistical sampling techniques. *Id.* 16-17. Although PRASA had promised to continue paying M&E during the course of the 1990 audit, PRASA withheld millions of dollars in payments, even as it continued to receive and accept additional equipment and services from M&E. *Id.* 17.

claimed Eleventh Amendment immunity. Shortly thereafter, it requested that the First Circuit stay the proceedings in the district court until the appeal was decided. On June 28, 1991, the First Circuit concluded that PRASA had demonstrated neither a probability of success on the merits nor a threat of irreparable injury and denied PRASA's application for a stay. *Id.* A-11-12. In denying the stay, the First Circuit stated that there was "substantial doubt" that "PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment." *Id.* A-12 (quoting *Paul N. Howard v. Puerto Rico Aqueduct and Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985)).

## IV.

## ONGOING ACTION IN THE DISTRICT COURT

Although PRASA did not begin to conduct discovery until the First Circuit denied its application for a stay in June 1991, PRASA has engaged in substantial discovery since then. Between August and November 1991, it served several sets of written discovery and required M&E to produce 1,500 boxes containing more than one million M&E documents. From October 1991 to the present, PRASA has taken twenty-eight depositions of M&E's current and former employees in cities ranging from Boston to Phoenix to San Juan. Discovery has been conducted on the subjects of both the underlying dispute and PRASA's claim of Eleventh Amendment immunity. According to an Initial Scheduling Conference Order issued by the district court, all depositions must be completed by mid-March 1992, and the case is scheduled for trial beginning May 18, 1992. These deadlines were confirmed at a status conference held by the district court on January 7, 1992.



## REASONS FOR DENYING THE PETITION

## I.

## THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS OVER THE APPEALABILITY OF AN INTERLOCUTORY DENIAL OF A CLAIM OF ELEVENTH AMENDMENT IMMUNITY THAT CANNOT BE DETERMINED SOLELY AS A MATTER OF LAW.

The decision of the First Circuit was correct. There is no conflict among the courts of appeals over the appealability of an interlocutory denial of a claim of Eleventh Amendment immunity that cannot be determined solely as a matter of law in the movant's favor. When faced with such a claim, the First, Second, Fifth and Sixth Circuits all have denied interlocutory review, or stated that they would do so. No circuit has held to the contrary.

PRASA's feigned conflict results from a fundamental misreading of the cases it cites. *Cf.* Pet. 11-12. Two of the decisions that PRASA claims "directly conflict" with the First Circuit decision instead held precisely what the First Circuit held: that interlocutory orders denying claims of Eleventh Amendment immunity were *not* immediately appealable. *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 504 (2d Cir. 1990); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 8, 1991) (No. 91-766). In *Yonkers*, the Second Circuit held that it lacked jurisdiction because the Eleventh Amendment immunity claim could not be determined solely as a matter of law:

> Denials of motions to dismiss on grounds of immunity, including Eleventh Amendment immunity, are not appealable [under *Cohen v. Beneficial Industrial Loan*

> *Corp.*, 337 U.S. 541 (1949)] unless the immunity defense can be decided *solely as a matter of law*... Thus, we have ruled that the *Cohen* doctrine does not authorize an immediate appeal where "the immunity issue turns on disputed questions of fact,"... or where the motion to dismiss is addressed to the complaint and the pleading itself does not reveal the degree to which the conduct complained of may fall within the scope of the immunity...

893 F.2d at 502-03 (emphasis added; citations omitted); *see Smith v. Reagan*, 841 F.2d 28, 31 (2d Cir. 1988) (dictum) (claim of Eleventh Amendment immunity may not be immediately appealable if there is a need for discovery or other pretrial proceedings related to the issue). In the *Corporate Risk* case, the Sixth Circuit held that *Cohen*'s finality requirement was not met where the state commissioners' Eleventh Amendment immunity claim raised factual issues. 1991 U.S. App. LEXIS 15001 at *5; *see also Hartman v. Univ. of Kentucky Athletic Ass'n*, Nos. 90-5821, 90-5837, 1991 U.S. App. LEXIS 8451 (6th Cir. April 24, 1991) (unpublished opinion) (court lacked jurisdiction to hear appeal from denial of motion for summary judgment where there were disputed fact issues).

PRASA also erroneously asserts that the Court of Appeals for the Fifth Circuit is in conflict with the First Circuit. *Cf.* Pet. 11. In fact, the Fifth Circuit has similarly stated that interlocutory appeal of a denial of an Eleventh Amendment immunity claim will be allowed "only if, as here, the immunity defense turns upon an issue of law and not of fact." *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990) (not cited by PRASA).[3]

[3]The Ninth Circuit has similarly held that it will not exercise its jurisdiction under 28 U.S.C. § 1292(b) where the issue involved in the denial of a claim of Eleventh Amendment immunity is "not exclusively one of law." *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, No. 90-56200, 1991 U.S. App. LEXIS 4841 at *4 (9th Cir. March 20, 1991) (unpublished opinion). Moreover, the Ninth Circuit noted that the district court's determination was "not controlling since the question may so easily be revisited by the district court at any time." *Id.* This disposition indicates that the Ninth Circuit would likely follow the rest of the circuits when faced with an interlocutory appeal of this sort brought under 28 U.S.C. § 1291.



The circuits are implementing in the Eleventh Amendment context the same approach taken in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for claims of qualified immunity. In *Mitchell*, this Court held that the denial of a claim of qualified immunity, "to the extent that it turns on an issue of law," is immediately appealable. *Id.* at 530.[4] The other cases cited by PRASA simply apply this principle to claims of Eleventh Amendment immunity: where such a claim can be determined solely as a matter of law, interlocutory appeal is allowed. *E.g.*, *Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986) (Eleventh Amendment clearly bars claim for money damages against state official acting in official capacity), *cert. denied*, 482 U.S. 906 (1987); *Dube v. State Univ. of New York*, 900 F.2d 587, 594 (2d Cir. 1990) (Second Circuit had previously determined that State University of New York was an "integral part of the government of the State" entitled to Eleventh Amendment immunity); *Coakley v. Welch*, 877 F.2d 304, 305-06 (4th Cir. 1989) (state official clearly a proper defendant in suit for prospective injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908)); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam) (Fifth Circuit had previously "clearly established"

[4]Like all circuits, the First Circuit has followed *Mitchell* and, when faced with a claim of qualified immunity that can be determined solely as a matter of law, will hear an interlocutory appeal. *E.g.*, *Roque-Rodriguez v. Mova*, 926 F.2d 103, 106 (1st Cir. 1991); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1189 (1st Cir. 1986).

the Eleventh Amendment immunity of the sole defendant, the Texas Department of Corrections); *Kroll v. Bd. of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 (7th Cir.) (Seventh Circuit had previously ruled that Board of Trustees was a state agency entitled to Eleventh Amendment immunity), *cert. denied*, 112 S.Ct. 377 (1991); *Schopler v. Bliss*, 903 F.2d 1373, 1379 (11th Cir. 1990) (per curiam) (Eleventh Circuit had previously established that Florida had not waived its Eleventh Amendment immunity).[5]

The result reached by the First Circuit in this case on the issue of immediate appealability is in harmony with the decisions of the other circuits. The submissions to the district court and the First Circuit relating to the merits of PRASA's claim, *see* C.A. App. 20-165, demonstrate that the claim involved questions of fact and could not have been determined in PRASA's favor solely as a matter of law. The petition should be denied because there has been no showing that *any* circuit would have taken jurisdiction over PRASA's interlocutory appeal.

## II.

## THIS IS NOT A SUITABLE CASE TO RESOLVE IMPORTANT ISSUES CONCERNING THE SCOPE OF ELEVENTH AMENDMENT IMMUNITY.

PRASA would like this Court to decide whether the Eleventh Amendment involves a right not to be tried. As shown

[5]The other two cases cited by PRASA as "directly conflicting" with the First Circuit, *Eng v. Coughlin*, 858 F.2d 889 (2d Cir. 1988), and *Chrissy F. v. Mississippi Dep't of Public Welfare*, 925 F.2d 844 (5th Cir. 1991), do not address the issue presented in this case. *Eng* involved a claim of Eleventh Amendment immunity raised by defendants on a summary judgment motion that had been ignored by the district court; the Second Circuit did no more than remand the issue to the district court for its consideration. 858 F.2d at 897. *Chrissy F.* involved a minor clarification of a district court order that had *granted* the defendants' motion for summary judgment based on Eleventh Amendment immunity. 925 F.2d at 848-49.



above, that issue is far too broadly framed and is not squarely presented in this case. There are, moreover, several additional reasons why the petition should be denied.

### A. The First Circuit's Decision Accords with This Court's Recent Decisions Relating to "Rights Not to Be Tried."

The First Circuit considered this Court's recent admonition concerning the facility with which alleged "rights not to be tried" can be claimed. In *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), this Court held that the denial of a criminal defendant's motion to dismiss on the ground of improper publication of grand jury proceedings was not immediately appealable. It cautioned:

> One must be careful . . . not to play word games with the concept of a "right not to be tried." In one sense, any legal rule can be said to give rise to a "right not to be tried" if failure to observe it requires the trial court to dismiss [the case]. But that is assuredly not the sense relevant for purposes of the exception to the final judgment rule.

*Id.* at 801 (citations omitted); *see Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) ("[I]n some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances . . . litigants must . . . [wait] until the end of proceedings before gaining appellate review"); *see also United States v. MacDonald*, 435 U.S. 850, 860 n. 7 (1978) (denying interlocutory appeal of denial of motion to dismiss based on alleged violation of Sixth Amendment right to speedy trial, even though there is always value "in triumphing before trial, rather than after it").

PRASA's defense, like many pretrial defenses, is a "right not to be tried" in the sense that a favorable ruling would allow it to avoid trial. But PRASA's claim of a broad exemption from any pretrial or trial proceedings is unpersuasive in this case, where discovery is almost completed and the case is close to trial. PRASA has not availed itself of all of the opportunities available to it to seek to avoid the burdens of litigation. As one example, PRASA has never sought a stay of the district court proceedings from this Court and has instead, from July 1991 through the present, initiated and engaged in substantial pretrial proceedings. Although PRASA has not waived whatever Eleventh Amendment defense it may have,[6] it has substantially weakened its claim that it is entitled to interlocutory review.

### B. The First Circuit's Decision Accords with Decisions of this Court Construing the Eleventh Amendment.

The First Circuit's decision is in harmony with the decisions of this Court. In *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), upon which the instant decision is based, the First Circuit considered this Court's decisions concerning Eleventh Amendment immunity and qualified immunity, especially this Court's decision in *Mitchell*. The First Circuit concluded that the interests underlying Eleventh Amendment immunity could be adequately vindicated upon an appeal from a final judgment. *Id.* at 407. It reasoned that *Libby* was different from *Mitchell* because *Libby* involved state defendants sued in their official capacity, not officials like Mitchell who would suffer the pernicious consequences of lawsuits brought against them in their individual capacities. *Id.* at 405-06.

[6] M&E has stipulated that PRASA's filing of an answer and assertion of counterclaims will not be deemed to constitute a waiver of any Eleventh Amendment immunity that PRASA may enjoy. Exhibit 11, Appendix to M&E's Motion to Dismiss Appeal filed in the Court of Appeals.



The differences between the interests underlying personal immunity and Eleventh Amendment immunity were recently noted by this Court in *Hafer v. Melo*, 112 S.Ct. 358 (1991). After recognizing that the "Eleventh Amendment bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury,'" *id.* at 364 (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)), this Court rejected a claim that the Eleventh Amendment barred suits against state officials sued in their individual capacities under § 1983. It reasoned that while imposing liability on state officers could hamper their performance of public duties, "such concerns are properly addressed within the framework of our personal immunity jurisprudence" and not the Eleventh Amendment. 112 S.Ct. at 364-65.

None of the cases cited by PRASA at Pet. 17-18 addressed the claimed Eleventh Amendment immunity of a public corporation that operates as a private enterprise. Although this Court has not ruled upon the issue, it long ago intimated that public corporations, much like counties, municipalities, and political subdivisions, are not shielded by Eleventh Amendment immunity. *See Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 645 (1911) ("neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty"). The decision of the First Circuit is in harmony with the decisions of this Court concerning Eleventh Amendment immunity as well as personal immunity.

### C. This Case Does Not Raise Any Federalism Concerns.

Contrary to PRASA's assertion, *cf.* Pet. 22-24, this case does not raise any federalism concerns.

First, the issue of whether Puerto Rico is a "State" entitled to the protection of the Eleventh Amendment has not been decided by this Court.[7] This Court has wrestled for many years with the status of the Commonwealth, holding that it is a State for some purposes and not a State for others. *E.g., Balzac v. Porto Rico*, 258 U.S. 298, 304-05 (1922) (Sixth Amendment did not apply to Puerto Rico as it was not a State or territory that had been incorporated into the United States); *see generally Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 580-97 (1976) (collecting statutes and cases regarding whether Puerto Rico is State or territory). The uncertainty is particularly significant in this case, for the claim of immunity is being raised not by the Commonwealth itself but by a Puerto Rican public corporation.

Second, federalism concerns cannot be evaluated without assessing, at least initially, the substantiality of the claimed immunity. Unless the Court were to adopt a rule that every claim of Eleventh Amendment immunity, however frivolous or insubstantial, must be reviewed on an interlocutory basis, the Court will have to make a preliminary decision both as to the applicability of the Eleventh Amendment to Puerto Rico and as to the substantiality of PRASA's claim, a claim not fully developed in the record below.

[7] Although this Court has commented that the government established in Puerto Rico in 1900 probably comes within "the general rule exempting a government sovereign in its attributes from being sued without its consent," *Porto Rico v. Castillo*, 227 U.S. 270, 273 (1913), it has not extended Eleventh Amendment protection to Puerto Rico. The First Circuit has ruled that, even though it is not a State, Puerto Rico enjoys the shelter of the Eleventh Amendment. *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983).



Third, if there is a federalism concern to be considered here, it is that the Court should not grant discretionary review to decide a question such as the scope of Eleventh Amendment immunity in a case where no State, and no "arm" of a State, is a party before this Court.

### D. There is Substantial Doubt Whether, on the Merits, Petitioner is Entitled to Eleventh Amendment Immunity.

This Court, while not asked to rule on the merits of PRASA's substantive claim,[8] should not exercise its discretionary review power over a procedural issue when there is substantial doubt whether PRASA is entitled to Eleventh Amendment immunity. The seriousness of that doubt is demonstrated by PRASA's complete autonomy from the Commonwealth, both in practice and in law, *see supra* at 3-4, and by judicial rejections of PRASA's claims that it operates as a part of the Commonwealth, *id.*, and that it enjoys Eleventh Amendment immunity.

The First Circuit has three times cast substantial doubt on PRASA's claimed immunity.[9] First, in *Paul N. Howard*, the

[8] PRASA's petition seeks review only of the limited jurisdictional issue. *See* Pet. i. If by citing *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982), *Florida Dep't of Health and Rehabilitation Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981), and *Alabama v. Pugh*, 438 U.S. 781 (1978), PRASA is suggesting the Court should summarily determine the merits of its claim of Eleventh Amendment immunity, that suggestion should be easily rejected. Discovery in this case, both on the claim of Eleventh Amendment immunity and on the underlying contractual dispute, is ongoing and had barely begun when the record was submitted to the First Circuit.

[9] The First Circuit in *Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034 (1st Cir. 1987), enumerated the factors relevant to the determination of a state agency's claim of Eleventh Amendment immunity. PRASA has exaggerated the effect of *Ainsworth* on subsequent First Circuit decisions. *Cf.* Pet. 7. The First Circuit's tentative statement in *Ainsworth* that the Puerto Rico Tourism Company was not an arm of the Commonwealth was based on the "erroneous impression" that the Tourism Company was funded primarily through slot machine concession revenues.

First Circuit held that PRASA had waived any Eleventh Amendment defense in that case and expressed "doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment." 744 F.2d at 886. The First Circuit reasoned that autonomous government corporations like PRASA are not "normally immune from suit in federal court," that PRASA's operations "generate substantial revenue," and that PRASA is "financially independent" from the Commonwealth. *Id.* Second, in denying PRASA's petition for rehearing of the *Paul N. Howard* case, the First Circuit stated that it remained "convinced that PRASA enjoys no Eleventh Amendment immunity." *Id.*[10] Finally, in denying PRASA's motion for a stay in this case, the First Circuit confirmed its "substantial doubt" that PRASA is entitled to Eleventh Amendment immunity. Pet. App. A-12.

### E. Petitioner's Claim Will Be Reviewable in Due Course.

There is a strong judicial and Congressional policy against

*In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940, 943 n. 3 (1st Cir. 1989). When presented with the fact that the Tourism Company received 70-75% of its funds directly from the Commonwealth and an array of other facts in a fully developed record, the First Circuit concluded that the Tourism Company was entitled to Eleventh Amendment protection. *Id.* at 943. Although PRASA argued below that it was indistinguishable from the Tourism Company and the Puerto Rico Ports Authority, it by no means "demonstrated" that. C.A. App. 37-140, 162-65; *cf.* Pet. 7. The United States District Court for the District of Puerto Rico has recently determined that the Ports Authority, acting in the proprietary capacity of contracting for the construction of a cargo building, was not entitled to Eleventh Amendment immunity. *Caribbean Airport Facilities, Inc. v. Puerto Rico Ports Auth.*, No. 90-2271 (D. P.R. January 27, 1992). PRASA was acting in a similar proprietary capacity when it negotiated and contracted with M&E for program management services.

[10] In its petition for certiorari filed in the *Paul N. Howard* case, PRASA told this Court that the First Circuit's opinion contained a "holding that PRASA possesses no [Eleventh Amendment] immunity." PRASA's Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit at 6-7, filed in *Puerto Rico Aqueduct and Sewer Auth. v. Paul N. Howard Co.*, No. 84-868 (U.S. 1985). PRASA now tells this Court that the First Circuit in *Paul N. Howard* "left open" the issue of PRASA's Eleventh Amendment immunity. *See* Pet. 6 n. 7.



piecemeal appeals. *E.g., Cohen*, 337 U.S. at 545-46; 28 U.S.C. § 1291 (appeal "from all final decisions of the district courts"). In general, appeal allows "review, not . . . intervention" and if a matter "remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen*, 337 U.S. at 546. Interlocutory review is a narrow exception to the final judgment rule and rests on the policy that only an exceptionally small set of cases should be interrupted by interlocutory review and thus spare parties the normal burdens of litigation. For the reasons stated above, that policy would not be served in this case.

This case is poised for trial and PRASA has not waived whatever Eleventh Amendment immunity it may have. It can seek review of a final judgment in the ordinary course in the context of a complete record.

## CONCLUSION

The Court should deny the petition for a writ of certiorari.

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Dated: February 18, 1992

# REPLY

# BRIEF

(3)

No. 91-1010

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

*Petitioner,*

v.

METCALF & EDDY, INC.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In departing from the decisions of six federal courts of appeals, did the Court of Appeals for the First Circuit err in holding that it lacked jurisdiction under 28 U.S.C. § 1291 to review interlocutory orders denying claims of Eleventh Amendment immunity from suit as collateral final orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

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IN THE
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v.

METCALF & EDDY, INC.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

The Petitioner, Puerto Rico Aqueduct and Sewer Authority (the "Authority" or "PRASA"), replies to arguments first raised in the Brief in Opposition filed by the Respondent, Metcalf & Eddy, Inc.

In the decision below, the First Circuit held that interlocutory orders denying claims to Eleventh Amendment immunity cannot be appealed as "collateral final orders" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Acknowledging the conflict among the circuits on this threshold question of jurisdiction over a general category of cases, the First Circuit dismissed the Authority's appeal without addressing the merits of the Authority's particular claim to immunity. In its Brief in Opposition, however,

Metcalf & Eddy erroneously argues that the First Circuit dismissed the appeal because the merits of the Authority's particular claim to immunity could not be determined as a matter of law.

Metcalf & Eddy then asserts that because of uncertainty whether the Eleventh Amendment applies to Puerto Rico and because of doubts whether the Authority is an arm of the Commonwealth of Puerto Rico, this case is not suitable for this Court's review. In fact, the opposite is true: granting the Petition for Writ of Certiorari and reversing the First Circuit will ensure that these important questions can be raised and addressed at the proper time in the proper forum.

## I.
## THE PETITION FOR CERTIORARI PRESENTS A QUESTION OF APPELLATE JURISDICTION OVER A CATEGORY OF CASES.

The jurisdiction of the United States courts of appeals is drawn in terms of "categories of cases." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); *Carroll v. United States*, 354 U.S. 394, 405 (1957). The Petition for Writ of Certiorari asks this Court to resolve a conflict among the United States courts of appeals as to whether of a particular category of interlocutory orders are appealable as "collateral final orders" under *Cohen*, 337 U.S. 541 (1949).

In the decision being appealed, *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991); Pet. App. A, and in the decision upon which it



is based, *Libby v. Marshall*, 833 F.2d 402, 404-07 (1st Cir. 1987), the First Circuit held that interlocutory orders denying claims of Eleventh Amendment immunity from suit comprise a general category of cases that are not appealable under *Cohen* as collateral final orders. The First Circuit acknowledged that its decision on this "threshold question of appellate jurisdiction," Pet. App. at A-3, conflicted with decisions of four other circuits.[1] Holding that interlocutory orders denying claims to Eleventh Amendment immunity cannot be appealed before trial, the court of appeals did not "consider the merits of PRASA's Eleventh Amendment defense" and took "no view as to whether PRASA is actually entitled to the claimed immunity." *Id.* at A-8, n.6.

In its Brief in Opposition, Metcalf & Eddy, Inc., characterizes the conflict among the courts of appeals as "feigned," Opp. at 7, even though six circuits have explicitly recognized the conflict.[2] Instead, Metcalf & Eddy errone-

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[1] "Cases from four of our sister circuits hold, contrary to *Libby*, that denials of Eleventh Amendment immunity claims are immediately appealable." *Metcalf & Eddy, Inc.*, 945 F.2d at 13 (citing cases); Pet. App. at A-7.

[2] In addition to the First Circuit, the conflict has been explicitly acknowledged by the Second Circuit, *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 502 (2d Cir. 1990) (citing *Libby*, 833 F.2d at 405 (1st Cir. 1987) as contradicting general authority); the Sixth Circuit, *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001, *5 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766) (same); the Seventh Circuit,

ously asserts that the appeal in this case was -- or could have been -- dismissed because the merits of the Authority's claim to Eleventh Amendment immunity "could not be determined, at least in its favor, solely as a matter of law." Opp. at i.

Metcalf & Eddy's expedient interpretation is contradicted by the First Circuit's own statements that it dismissed the Authority's appeal because the appeal belonged to a category of cases over which the court had no jurisdiction. Metcalf & Eddy's interpretation is inconsistent with the district court's disposition of the Authority's claim to Eleventh Amendment immunity as a matter of law:

> In addition, the defendant is not entitled to Eleventh Immunity [sic] in this case because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

Pet. App. B at A-9.

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*Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, 112 S. Ct. 377 (1991) (same); the Ninth Circuit, *Marx v. Government of Guam*, 866 F.2d 294, 296 n.2 (9th Cir. 1989) (same); and the Eleventh Circuit, *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1508 (11th Cir. 1990) (same). Although Metcalf & Eddy cites *Yonkers Bd. of Educ.* and *Corporate Risk Management Corp.* as holding "precisely what the First Circuit held," Opp. at 7, in fact, both decisions explicitly acknowledged a conflict with the First Circuit over the threshold question of jurisdiction.



There is nothing in the First Circuit's or the district court's decisions that states or implies that either court was unable to determine the merits of the Authority's claim, or that either court left unresolved factual issues open for further development.[3] If such factual issues existed, the First Circuit should have remanded the case to resolve them. *See, e.g., Ainsworth Aristocrat Int'l Pty. v. Tourism Co.*, 818 F.2d 1034, 1038-39 (1st Cir. 1987) (remanding "for full hearing on the Eleventh Amendment issue."). The First Circuit can determine that unresolved factual issues exist in this case only after it exercises jurisdiction over the general category of interlocutory orders denying claims to Eleventh Amendment immunity.

## II.
## THIS CASE PRESENTS IMPORTANT FEDERALISM CONCERNS.

Although twenty states and two Commonwealths as *amici* recognize the important federalism concerns raised by the Petition, Metcalf & Eddy argues that this case presents none. Metcalf & Eddy first argues that no federalism concerns are present because of "uncertainty" whether the Eleventh Amendment applies to Puerto Rico. Opp. at 14.

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[3] Metcalf & Eddy alludes to unidentified "submissions to the district court and the First Circuit," which it asserts demonstrate that the Authority's claim to immunity "involved questions of fact" that could not have been determined as a matter of law. Opp. at 10. The court of appeals never mentioned unresolved "issues of fact" as a basis for declining appellate jurisdiction.

Amendment immunity. Opp. at 14-16. These arguments go to the merits of the Authority's appeal and are best addressed by the court of appeals. This Court may properly deal with questions relating to the merits of the appeal by granting the Petition for Writ of Certiorari and reversing the decision of the First Circuit, thus permitting that court to resolve them before trial.

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---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

**BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER**

**BRIEF OF AMICI CURIAE, THE STATES OF OHIO, ARKANSAS, CALIFORNIA, FLORIDA, ILLINOIS, INDIANA, KANSAS, MAINE, MICHIGAN, MONTANA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OREGON, RHODE ISLAND, UTAH, VERMONT, WISCONSIN AND THE COMMONWEALTHS OF MASSACHUSETTS, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, AND PUERTO RICO.**

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## INTEREST OF THE AMICI CURIAE

The State of Chio, joined by the states and commonwealths identified above, submits this brief *amici curiae* in support of the petitioner, urging this Court to grant the petition for writ of certiorari and reverse the holding of the court below. This case provides the Court with the opportunity to address a conflict between the First Circuit Court of Appeals and several other circuits, resolving whether district court orders denying states' motions to dismiss predicated on the eleventh amendment are immediately appealable under the collateral order doctrine. The issue presented affects the litigation



resources of all states and the dockets of all United States district courts. Thus, the states have a significant interest in the resolution of this matter.

## STATEMENT OF THE CASE

The facts set forth herein are taken from the First Circuit's decision below. *See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority,* 945 F.2d 10 (1st Cir. 1991). The Puerto Rico Aqueduct and Sewer Authority (PRASA) was established by the Puerto Rico legislature as "a public corporation and an autonomous government instrumentality" to provide drinking water and sanitary sewage service to the inhabitants of Puerto Rico. 22 L.P.R.A. §§142, 144 (1987).

In 1986, PRASA entered into a contract with Metcalf & Eddy, Inc. (Metcalf), an engineering firm, to provide extensive services to bring eighty-three of PRASA's facilities into compliance with federal "clean water" standards. Later, Metcalf and PRASA had contract disputes and in 1990 Metcalf filed a diversity action against PRASA in the United States District Court for the District of Puerto Rico for a declaration of the parties' contractual rights and for $52,000,000 in damages for breach of contract.

PRASA filed in the district court a motion to dismiss based on its immunity from suit under the Eleventh Amendment to the United States Constitution. The district court denied the motion to dismiss and ordered PRASA to answer the complaint. PRASA took an immediate appeal to the First Circuit and requested a stay of the district court proceedings. The First Circuit denied the stay and later, as reported in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority,* 945 F.2d 10 (1st Cir. 1991), dismissed PRASA's appeal for want of federal jurisdiction under 28 U.S.C. §1291. Relying upon its earlier decision in *Libby v. Marshall,* 833 F.2d 402 (1st Cir. 1987), the First Circuit held that the denial of a state's eleventh amendment claim of immunity from suit does not confer a right to an immediate appeal. The First Circuit explicitly acknowledged that four other circuit courts of appeals had held otherwise.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with decisions issued by every other United States court of appeals to address whether an immediate appeal lies from an interlocutory order denying a state's claim of immunity predicated on the eleventh amendment.

2. The decision of the court below upsets the balance between the federal government and the states maintained by the eleventh amendment. This case, therefore, presents a question of national importance that should be settled by this Court.

## REASONS FOR GRANTING THE WRIT

The First Circuit's holding that interlocutory orders disposing of eleventh amendment claims are not immediately appealable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), denies states and their agencies immunity from suit in federal court. This ill-conceived holding directly affecting the important relationship between the eleventh amendment and federal appellate jurisdiction is in conflict with the decisions of every other circuit court to address the issue. It also ignores compelling language found in many of this Court's cases discussing the scope of the protection afforded states by the eleventh amendment. Accordingly, this Court's full review of this case is warranted.

### 1. The Decision Below Creates A Conflict Between Circuits

Every other circuit court to address the issue has concluded, contrary to the decision of the First Circuit, that an immediate appeal is available when a state's assertion of eleventh amendment immunity is rejected by a district court. *See Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987); *Dube v. State University of New York*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Board of Education*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied*, 492 U.S. 976 (1989); *Loya v. Texas Department of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Chrissy F. By Medley v. Mississippi Department of Public Welfare*, 925 F.2d 844 (5th Cir. 1991); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds, Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766); *Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, ___ U.S. ___ , 112 S.Ct. 377 (1991); and *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).



As noted by the Second Circuit in *Minotti*, 798 F.2d at 608:

> the Supreme Court has held that denial of a substantive claim of absolute immunity may be appealable before final judgment. [citation omitted]. More recently, the Court has applied the collateral order doctrine to 'denial of a claim of qualified immunity . . . [citation omitted]. In the case of an absolute immunity such as that provided by the eleventh amendment, the essence of the immunity is the possessor's right not to be haled into court - a right that cannot be vindicated after trial . . . ."

The Second Circuit's reasoning is compelling: the eleventh amendment prohibits the exercise of federal judicial power over the states, not merely the power of federal courts to impose judgments. Even in cases authorized by this Court's landmark decision in *Ex Parte Young*, 209 U.S. 123 (1908), suit must be brought against a state official, not a state. Indeed, the "fiction" of *Ex Parte Young* - prospective relief sought from a state official in his official capacity is not a suit against the state - was made necessary because of the existence of the eleventh amendment. Unlike courts in the Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits, the lower court failed or refused to recognize this fact.

The First Circuit's interpretation of the eleventh amendment is irreconcilable with the interpretation adopted by other circuits. In light of these discordant opinions, this case presents this Court with an ideal opportunity to resolve a conflict between the courts of appeals that is "sufficiently crystalized to warrant certiorari if federal law is to be maintained in any satisfactory uniform condition." *Beaulieu v. United States,* ___ U.S. ___ , 110 S.Ct. 3302, 3303 (1990) (White, J., dissenting from denial of petition for writ of certiorari).

**2. This Case Presents A Question Of National Importance That Should Be Settled By This Court**

"[T]his Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974) (citations omitted). The First Circuit's decision, however, has the effect of transforming the Court's phrase, "immune from suit," into "judgment proof after trial," thereby distorting the nature of eleventh amendment immunity. A comparison of the majority and concurring opinions in *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 110 S.Ct. 1868 (1990), highlights this distortion.

In *PATH,* two of the defendant's employees allegedly were injured on the job and sought to recover damages under several federal statutes. At issue before this Court was whether the states of New York and New Jersey, which had created PATH, had in the process waived PATH'S immunity from suit. A unanimous Court held that they had. The Court split, however, over the proper characterization of eleventh amendment immunity.

The majority, speaking in the same broad terms the Court utilized in *Edelman,* reiterated that consistent with the eleventh amendment "an unconsenting State is immune from suits brought in federal courts . . . ." *PATH,* 110 S.Ct. at 1872 (citations omitted). The concurrence objected to the breadth



of this interpretation, opining that "the Eleventh Amendment secures States only from being *haled into federal court* by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity." *PATH,* 110 S.Ct. at 1875 (Brennan, J., concurring) (emphasis added).

Clearly, whatever dispute exists between members of this Court concerning the nature of eleventh amendment immunity, it does not involve whether the amendment protects states "from being haled into federal court," but, rather, whether that protection extends beyond diversity actions. Thus, if the immunity offered by the eleventh amendment is immunity from being haled into court, then the First Circuit's position that a state's right to be immune from suit in federal court "can be adequately vindicated upon appeal from a final judgment" plainly is wrong.[1]

The lower court's holding that there can be no immediate appeal from an order denying a motion to dismiss predicated on the eleventh amendment, in addition to being conceptually incorrect, will produce undesirable jurisprudential results. Quite often, a state and its officials will be named as defendants in a federal lawsuit for monetary relief. It is quite likely that the officials will assert either absolute or qualified immunity and that the state will assert eleventh amendment immunity.

If the assertions of immunity made by the officials and the state are rejected by the district court, then, consistent with earlier opinions of this Court, the officials will be able to take an immediate appeal. The state, however, because of the First Circuit's holding in this case, will not be permitted to appeal immediately.

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[1] Either the majority or concurrence's interpretation in *Path* of the eleventh amendment would justify summary reversal. *See Mireles v. Waco,* ___ U.S.___ , 112 S.Ct. 286, 290 (1991) (Scalia, J., dissenting) (summary reversal appropriate when "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error") (citations omitted).

If the court of appeals reverses the denial of the officials' motion to dismiss, those officials will be dropped from the case. The state, on the other hand, will be forced to endure the burdens of a trial despite the fact that any judgment entered against it will be unenforceable.

If the states cannot appeal orders denying their eleventh amendment claims until after trial, the right to be protected from a lawsuit in federal court is destroyed. Eleventh amendment immunity, therefore, must be treated as are immunities for officials - immunity from suit, not just monetary liability. *See Mireles v. Waco*, ___ U.S. ___ , 112 S.Ct. 286, 288 (1991) (per curiam) ("official immunity is immunity from suit, not just from ultimate assessment of damages").

The eleventh amendment represents a "fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). The decision of the court below disrupts this balance by shifting its fulcrum to one side. Thus, this Court is presented with a timely opportunity to preserve this fundamental constitutional balance and continue its explication of the relationship between immunity defenses and the collateral order doctrine. This case, therefore, warrants this Court's plenary review.



## CONCLUSION

For the preceding reasons, amici curiae urge this Court to grant the writ of certiorari sought by Petitioner.

Respectfully submitted,

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No. 91-1010



IN THE

# Supreme Court of the United States

October Term, 1991

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PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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## SUPPLEMENTAL BRIEF IN OPPOSITION

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IN THE

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October Term, 1991

No. 91-1010

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Petitioner,*

vs.

METCALF & EDDY, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## SUPPLEMENTAL BRIEF IN OPPOSITION

## INTRODUCTION

Pursuant to Supreme Court Rule 15.7, Metcalf & Eddy, Inc., respondent herein, submits this supplemental brief in opposition to apprise the Court of intervening matters not available at the time of respondent's last filing.

Three days after it filed its Reply Brief in this Court, the Puerto Rico Aqueduct and Sewer Authority ("PRASA"), petitioner herein, filed in the district court a motion to stay the district court proceedings pending disposition of its petition for a writ of certiorari. That timing is telling. Indeed, the motion to stay -- an obvious afterthought -- is yet another contradiction between PRASA's conduct and PRASA's contentions in this case.

PRASA has done more than simply let this case proceed to the eve of trial. While it argues to this Court that the Eleventh Amendment prevents it from even being haled into federal court, PRASA has instead chosen to litigate this case to the point of trial. In addition to the facts already noted, see Brief in Opp. 6, PRASA has noticed and taken additional depositions and, on the very day respondent's Brief in Opposition was being filed, PRASA itself filed three motions for summary judgment in the district court — all after filing its petition for certiorari and before filing its motion to stay. PRASA only sought its stay after M&E, in its Brief in Opposition, pointed out that the petition should be denied because PRASA has not done all it could have done to avoid the burdens of litigation. See id. at 12. PRASA has not defended its substantial participation in and initiation of pretrial proceedings in the district court or its undue delay in seeking a stay.

Although PRASA has persuaded a minority of States to file an amici brief in support of its petition, the States' brief does not reflect a full understanding of the facts of this case, PRASA's conduct in the last several months, or the applicable law. The States cite no cases but hypothesize that the First Circuit's decision raises the possibility that a State may be forced to stand trial while individual officials also named as defendants are dismissed. See Brief of Amici Curiae 6-7. This case, however, is not one where a State and its officials are defendants. The sole defendant in this case is PRASA, an autonomous public corporation whose claim to Eleventh Amendment immunity is at best extremely weak and whose claim to interlocutory review is disingenuous in light of its recent conduct. The broad issue the States would like to see addressed — whether the Eleventh Amendment permits a State to avoid all of the burdens of



litigation including pretrial discovery — is simply not present here because PRASA largely accepted those burdens by choosing to litigate rather than promply seeking a stay or review from this Court. This Court is constitutionally constrained to the issues, facts, and parties actually present in this case.

This case is ready for trial. The First Circuit's ruling was correct and its judgment on the issue actually presented in this case is in harmony with the other circuits. See Brief in Opp. 7-10. PRASA is free to seek review on a "proper record" at the end of the case. See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth., 945 F.2d 10, 14 n. 6 (1st Cir. 1991). Whatever disagreements there may be with the First Circuit's language, the result would not have been different in any other circuit. The broad issue the States and PRASA would like to see resolved must wait until a proper defendant fairly presents that issue. PRASA is not such a defendant and this Court should deny the petition for a writ of certiorari.

Dated: February 27, 1992 Respectfully submitted,

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Attorneys for Respondent

No. 91-1010

IN THE

# Supreme Court of the United States

October Term, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Petitioner,*

vs.

METCALF & EDDY, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## MOTION FOR SUMMARY DISPOSITION

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ON WRIT OF CERTIORARI TO THE
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FOR THE FIRST CIRCUIT

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## MOTION FOR SUMMARY DISPOSITION

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### INTRODUCTION

Pursuant to Supreme Court Rules 16.1 and 21, Metcalf & Eddy, Inc., respondent herein, moves for summary disposition of this case. In the alternative, Metcalf & Eddy requests that the Court determine this case based upon the briefs filed by the parties to date and set this case for oral argument during the current Term.

## ARGUMENT

The Puerto Rico Aqueduct and Sewer Authority ("PRASA"), petitioner herein, requested summary disposition of its petition for certiorari on the issue of whether it was entitled to take an interlocutory appeal, under the collateral order doctrine, from the district court's denial of its claim of Eleventh Amendment immunity. [1] Now that the Court has granted certiorari, Metcalf & Eddy agrees that summary disposition of the appellate procedural issue raised in the petition is appropriate. [2] The appellate procedural issue has been fully briefed in the First Circuit and in the parties' prior submissions to this Court. Accordingly, M&E joins PRASA in urging the Court to dispose summarily of the procedural issue presented.

Important practical concerns also require that the Court adjudicate the procedural issue summarily. For Metcalf & Eddy, these practical concerns are a matter of fundamental fairness and justice. This is a straightforward breach of contract case that is ready for trial on May 18, 1992, the date set by the district court. Metcalf & Eddy is attempting to collect more than $30 million of its own funds which it has already advanced on behalf of PRASA and Metcalf & Eddy's sole interest is in

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1 PRASA stated, "[B]ecause the facts relevant to this Court's disposition of this jurisdictional question are not in dispute, the Petitioner respectfully suggests that summary disposition of this appeal may be appropriate . . . " Pet. at 24.

2 The appellate procedural issue on which certiorari was granted is appropriate for summary disposition, but the merits of PRASA's claim of Eleventh Amendment immunity are not. See Brief in Opp. at 15 n. 8.



the speedy resolution of its claim. The costs of prosecuting this action and the loss of use of its capital to date exceed $9.5 million, and are having an adverse impact on the company. An unnecessarily protracted appeal in this Court will add to that burden.

Unless this Court acts summarily, the case will be halted pending the decision next Term on whether PRASA is entitled to take an interlocutory appeal under the collateral order doctrine. If PRASA prevails on that issue next Term, the case will then be remanded to the First Circuit for consideration of the merits of PRASA's interlocutory appeal. If PRASA loses on the procedural issue next Term, the case will be remanded to the district court for trial at that time. In either event, there will be substantial delay in the resolution of a case that is ready for trial now.

Metcalf & Eddy's interest in the outcome of the appellate procedural issue on which certiorari has been granted is negligible. Moreover, no court has ever ruled that PRASA is an arm of a State entitled to Eleventh Amendment immunity and the First Circuit has strongly suggested it will rule against PRASA when given the opportunity here. See Pet. App. A-12 ("substantial doubt" that PRASA is entitled to Eleventh Amendment immunity); Paul N. Howard v. Puerto Rico Aqueduct and Sewer Auth., 744 F.2d 880, 886 (1st Cir. 1984) (dictum) ("[w]e doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment"), cert. denied, 469 U.S. 1191 (1985); see also Brief in Opp. at 15-16. Full briefing and argument on the appellate procedural issue is an unnecessary delay and expense when both parties agree that summary disposition is appropriate and the greatest likelihood is that PRASA will ultimately lose on the merits of its claim of Eleventh Amendment immunity. Accordingly, the Court should summarily resolve the

procedural issue.

In the alternative, Metcalf & Eddy requests that the Court determine this case based upon the briefs filed by the parties to date and set this case for oral argument during the current Term.

## CONCLUSION

For the foregoing reasons, Metcalf & Eddy requests that its motion for summary disposition be granted.

Dated: March 13, 1992 Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## OPPOSITION TO MOTION FOR SUMMARY DISPOSITION

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## OPPOSITION TO MOTION FOR SUMMARY DISPOSITION

Petitioner, the Puerto Rico Aqueduct and Sewer Authority, opposes Respondent's Motion for Summary Disposition.

By granting the Petition for Writ of Certiorari and setting the case for full briefs and argument, this Court determined that the parties and interested *amici* should be given the opportunity to present a more thorough analysis of the merits than was possible at the Petition stage. While the analysis contained in the Petition could have justified summary reversal of the decision below, it did not include as developed a discussion of the issues as Petitioner expects to submit in its brief on the merits.

Respondent's efforts to short-circuit the usual process of this Court should be rejected. Summary affirmance of the decision below would reverse the decisions of six other circuits without having given Petitioner and the twenty-two States and Commonwealths which supported the Petition an opportunity to address the matter fully.

Respondent's concern about the cost of awaiting full adjudication is shared by virtually every respondent before this Court. That concern does not justify deviating from this Court's usual practice of considering the issue in question upon full briefing and oral argument — particularly as Respondent has always been free to prosecute this case in courts of the Commonwealth of Puerto Rico, thereby avoiding whatever delay may have been associated with Petitioner's assertion of its rights under the Eleventh Amendment.

Because of the serious consequences of this case for each of the United States and Commonwealths, Respondent's Motion for Summary Disposition should be denied.



Respectfully filed on March 23, 1992,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## BRIEF OF PETITIONER

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## QUESTION PRESENTED

Is a district court's denial of a claim of Eleventh Amendment immunity from suit in federal court immediately appealable under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

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## OPINIONS BELOW

The decision of the Court of Appeals for the First Circuit being reviewed is reported as *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). This decision is reprinted in Pet. App. A1-A8.

The order of the United States District Court for the District of Puerto Rico (Pieras, J.) denying the Petitioner's claim to Eleventh Amendment immunity from suit in federal court is not reported. It is reprinted in Pet. App. A9-A10.

## JURISDICTION

The judgment of the court of appeals was entered on September 25, 1991. The Petitioner filed a timely Petition for Writ of Certiorari on December 23, 1991. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).



## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

P.R. Laws Ann. tit. 22, § 142. Creation and composition of the Authority.

There is hereby created a public corporation and an autonomous government instrumentality of the Commonwealth of Puerto Rico by the name of "Puerto Rico Aqueduct and Sewer Authority", said corporation being referred to herein as the "Authority".

The exercise by the Authority of the powers conferred by sections 141-161 of this title shall be deemed and held to be an essential government function.

No. 91-1010

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*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## STATEMENT OF THE CASE

This is a diversity action brought in federal court against Petitioner, a government instrumentality of the Commonwealth of Puerto Rico. The district court rejected Petitioner's claim of Eleventh Amendment immunity from suit in federal court and refused to dismiss the action. The court of appeals held that the order denying the claim of immunity was not immediately appealable, thus allowing the case to proceed with discovery and trial.

The question presented to this Court is whether the courts of appeals have interlocutory appellate jurisdiction to vindicate the States' constitutional right not to be subject to the judicial authority of the federal courts.

**A. Relationship of the Authority to the Commonwealth.**

The Puerto Rico Aqueduct and Sewer Authority (the "Authority"), a public corporation, was created by the Commonwealth of Puerto Rico as an "autonomous government instrumentality of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 22, § 142. The Commonwealth delegated to the Authority the responsibility for delivering drinking water and treating wastewater throughout the Commonwealth of Puerto Rico — services which historically have been performed by the state in Puerto Rico, not by municipalities. *Id.* § 144.[1] Accordingly, the Legislature of Puerto Rico has declared that the Authority performs an "essential government function." *Id.* § 142.

The Authority is one of a number of Puerto Rican public corporations established by the Commonwealth as government instrumentalities.[2] The First Circuit Court of Appeals has held that two such public corporations, both of which have a "legal existence and personality separate and apart from that of the Commonwealth Government,"[3] are each entitled to immunity under the Eleventh Amendment. *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 12 (1st Cir. 1990) (Puerto Rico Ports Authority immune); *In re San Juan DuPont Plaza Hotel Fire Litig.*, 888 F.2d 940, 944 (1st

1. *Puerto Rico Aqueduct & Sewer Auth. v. Unión de Empleados*, 105 T.P.R. 602, 628, 105 P.R. Dec. 437 (1976) ("[T]he services rendered by the Authority have been normally rendered by the State in Puerto Rico.").

2. In Puerto Rico, the Commonwealth created three classes of government instrumentalities to undertake government public works and responsibilities. *Torres Ponce v. Jiménez*, 113 P.R. Dec. 158 (1982) (classes include government departments and agencies, public corporations, and joint stock companies under laws of private corporations).

3. P.R. Laws Ann. tit. 23, § 671a (Tourism Company of Puerto Rico); *Id.* tit. 23, § 333(a), (b) (Puerto Rico Ports Authority).



Cir. 1989) (Tourism Company of Puerto Rico immune).[4]

**B. The Authority and the M&E Contract.**

As the entity responsible for wastewater treatment throughout the Commonwealth, the Authority has been the defendant in a lengthy enforcement proceeding brought by the United States Environmental Protection Agency ("EPA") under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* In 1985, the Authority and EPA entered into a comprehensive consent order, which, as supplemented, required the repair and rehabilitation of 83 of the plants operated by the Authority and set forth schedules for completing the improvements. Pet. App. at A2.

In March 1986, the Authority executed a contract with Respondent, Metcalf & Eddy, Inc. ("M&E"), a private engineering firm, to assist it in complying with the consent order. *Id.* Between 1986 and 1991, M&E and its subsidiary, Metcalf & Eddy de Puerto Rico, Inc., billed the Authority approximately $180 million for the services performed under the contract.

In 1990, the Puerto Rico Infrastructure Financing Authority, an affiliate of the Government Development Bank of Puerto Rico, audited M&E's billings under its contract with the Authority. Appendix to First Circuit

4. In addition, the District Court for the District of Puerto Rico has afforded Eleventh Amendment immunity to the Puerto Rico Medical Services Administration, *Rodriguez Diaz v. Sierra Martinez*, 717 F. Supp. 27, 31 (D.P.R. 1989); the Puerto Rico Elections Commission, *Torres Torres v. Comision Estatal de Elecciones de P.R.*, 700 F. Supp. 613, 620 (D.P.R. 1988); the Recreational Development Company of Puerto Rico, *Villegas Davila v. Pascual*, 631 F. Supp. 919, 922 (D.P.R. 1986); and the Cooperative Development Administration of Puerto Rico, *Cancel v. San Juan Constr. Co.*, 387 F. Supp. 916, 919 (D.P.R. 1974). *But see Caribbean Airport Facilities, Inc. v. Puerto Rico Ports Auth.*, No. 90-2271 (D.P.R. Jan. 27, 1992) (Ports Authority not entitled to Eleventh Amendment immunity when acting solely in non-governmental, proprietary capacity).

Briefs ("1st Cir. App.") at pp. 184-280. The audit evaluated M&E's systems of internal control and concluded that M&E and its Puerto Rican subsidiary had "no internal controls in place" to prevent billing errors. *Id.* at p. 188. The audit also concluded that M&E and its subsidiary had overbilled the Authority by more than $18 million in questioned costs in 61 audited invoices. Based on its statistical sampling of invoices, the audit projected nearly $40 million in such questioned costs in the 2,219 invoices that the companies had submitted prior to the audit. *Id.* at p. 263.

The Authority sent M&E a draft of the audit report on August 10, 1990. Six weeks later M&E filed the present damages action against the Authority in the United States District Court for the District of Puerto Rico. The action invoked the federal court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1). M&E named the Authority as the sole defendant and, relying exclusively on Puerto Rican law, alleged breach of contract and damage to its business reputation. Amended Complaint (Sept. 25, 1991).

### C. The Authority's Claim to Immunity.

On February 26, 1991, the Authority filed the motion that gave rise to this appeal: a motion to dismiss based on a claim of immunity from suit in federal court under the Eleventh Amendment to the United States Constitution. In its motion, the Authority argued that as an "arm of the State" of Puerto Rico, *see Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co.*, 818 F.2d 1034, 1037 (1st Cir. 1987) ("arm of the State" test), it was shielded from M&E's Commonwealth-law claims in federal court.[5] The Authority urged M&E to refile the

5. In the decision being appealed, the First Circuit held "that Puerto Rico is to be treated as a state for Eleventh Amendment purposes." Pet. App. at A3 n.1 (citing *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983)). M&E did not ask the First Circuit or this Court to reconsider this well-settled principle. For the purposes of this case, Puerto Rico is to be treated as a State.



lawsuit in the courts of the Commonwealth of Puerto Rico, which the Authority acknowledges would have jurisdiction over the suit. 1st Cir. App. at p. 166.[6]

On May 17, 1991, the district court denied the Authority's motion to dismiss under the Eleventh Amendment. Ignoring the First Circuit's seven factor "arm of the State" test, the district court refused to dismiss the action, asserting only that the Authority has the "ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds." Pet. App. at A9.

6. In the Commonwealth courts, the proceeding would be conducted in Spanish, the native language of the vast majority of the Authority's employees and witnesses. In the District Court, the proceedings are in English, through translators if necessary. 48 U.S.C. § 864. The courts of the Commonwealth, directly familiar with the Commonwealth's civil code (not common law) antecedents and history, are the Authority's preferred tribunals to give effect to the immunities originally granted to the Authority under Commonwealth law in the Spanish language. *See, e.g.*, P.R. Laws. Ann. tit. 22, § 144(c) (Authority is immune from certain damage suits and Authority's property is immune from judicial execution and sale); *Arraiza v. Reyes*, 70 P.R.R. 583, 587, P.R. Dec. 614 (1949) (Authority's funds cannot be judicially attached if attachment interferes with Authority's "governmental functions"). *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

### D. The Authority's Appeal of the District Court's Denial of its Claim to Eleventh Amendment Immunity.

The Authority immediately appealed the district court's order to preserve its claim to Eleventh Amendment immunity from suit in federal court.[7] On September 25, 1991, the Court of Appeals for the First Circuit dismissed the Authority's appeal for want of appellate jurisdiction without addressing the merits of the Authority's Eleventh Amendment claim. *Id.* at A8 n.6. Holding that *stare decisis* required it to follow its earlier decision in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the court below concluded that the Eleventh Amendment does not provide States or state entities with an entitlement not to stand trial in the federal courts. Pet. App. at A4 (citing *Libby*, 833 F.2d at 404-07).[8] Instead, the court held that the Eleventh Amendment does no more than protect state treasuries from monetary judgments, an interest that " 'can be adequately vindicated upon an appeal from a final judgment. . . .' " *Id.* at A4 (quoting *Libby*, 833 F.2d at 407). For that reason, while acknowledging that its conclusion conflicted with the decisions of other circuits, *id.* at A7 (citing four conflicting cases), the First Circuit held that interlocutory orders denying claims to Eleventh Amendment immunity from suit are not appealable as collateral final orders under *Cohen v.*

7. The Authority sought to stay the district court proceedings, but both the district court and the court of appeals denied its requests. Pet. App. at A3 n.2. The court of appeals nonetheless held that the Authority would not waive its immunity claim by further participation in the district court proceedings, including the filing of counterclaims. *Id.* at A12. M&E has acknowledged that the Authority has not waived its claim to immunity. Br. in Opp. at p. 12.

8. In the decision being appealed, the First Circuit engaged in relatively little original analysis and, holding that it was bound by the decision of the earlier panel, relied instead on the holding, reasoning, and language of *Libby*. Pet. App. at A4 ("*Libby* must shape our consideration of [the Authority's] appeal.") The Authority's argument thus addresses the rationale of *Libby*, which the First Circuit explicitly adopted in the decision being appealed. *Id.*



*Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Pet. App. at A3-A4.[9]

## SUMMARY OF ARGUMENT

The Eleventh Amendment protects the dignity and sovereignty of States by shielding them from involuntary submission to the jurisdiction of the federal courts. Interlocutory orders that deny claims of Eleventh Amendment immunity are immediately appealable under the *Cohen* collateral order doctrine, because such orders imperil the States' sovereign prerogative not to be compelled to submit to federal jurisdiction at the instance of private parties. Only an immediate appeal of such orders can preserve this fundamental right of the States within our federal system.

The United States Court of Appeals for the First Circuit erred in holding that orders denying claims of Eleventh Amendment immunity from suit are not appealable as collateral final orders under *Cohen*. The First Circuit's holding is based on the erroneous premise that the Eleventh Amendment only provides an immunity from monetary liability and does not shield unconsenting States from suit in the federal courts. The First Circuit's opinion is contrary to the wording of the Eleventh Amendment, the history of the Amendment, and this Court's clear statements on the significance and purpose of the Eleventh Amendment.

9. On March 12, 1992, three days after this Court granted certiorari, the district court stayed all proceedings pending appellate disposition of the Authority's claim to Eleventh Amendment immunity.

## ARGUMENT

## I.

## ELEVENTH AMENDMENT IMMUNITY FROM SUIT, FULLY APPLICABLE IN DIVERSITY CASES, PROTECTS STATES FROM BEING FORCED TO SUBMIT TO FEDERAL JUDICIAL AUTHORITY

### A. The Eleventh Amendment Broadly Shields States From Diversity Actions Commenced or Prosecuted by Individuals.

This Court has made clear that the Eleventh Amendment, both because of its explicit text and for fundamental structural reasons, broadly shields States from private actions brought in federal court:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*.

*Pennhurst*, 465 U.S. at 98 (quoting *In re State of New York*, 256 U.S. 490, 497 (1921)). Most relevant to the present case, the Eleventh Amendment absolutely shields States from diversity actions. *See Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 487 (1987) (plurality opinion) ("[T]he Eleventh Amendment established 'an absolute bar' to suits by citizens of other States or foreign states.") (quoting *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)); *Pennhurst*, 465 U.S. at 100 ("[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.") (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973)).[10]



The Amendment specifically was enacted in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which this Court exercised jurisdiction over a diversity action brought against a State. "The reaction to *Chisholm* was swift and hostile." *Welch*, 483 U.S. at 484. The Eleventh Amendment bar on federal suits was immediately placed in the Constitution to restore the Framers' understanding that the federal judicial power did not allow a State "to be called to the bar of the federal court." *Id.* at 480 n.10. (noting views of Madison, Hamilton, and Marshall).[11] Accordingly, it has been recognized consistently, even by Justices who have read the Amendment narrowly, that federal courts may not entertain diversity cases – like this one – brought by individuals against States. *See Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 310 (1990) (Brennan, J., dissenting) ("[T]he Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity.").

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10. *See also Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991) ("[A] State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.' "); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982) ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity."); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment."); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Court need not examine "the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence.").

11. As this Court explained in *Hans*, "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." 134 U.S. at 12.

Beyond its specific origins and application to diversity cases, the Eleventh Amendment embodies a protection of state sovereignty as broad as the structural principle the Amendment reflects. It shields States from damages actions, *see, e.g., Kentucky v. Graham*, 473 U.S. 159 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); from equitable claims, *see, e.g., Cory v. White*, 457 U.S. 85, 90-91 (1982); and from claims in admiralty, *In re State of New York*, 256 U.S. 490; *In re State of New York*, 256 U.S. 503 (1921). It applies whenever the State is the defendant, *Pugh*, 438 U.S. at 782 (per curiam), or when an instrumentality of the State is the defendant.[12] Because the Eleventh Amendment gives constitutional recognition to a principle of state sovereign immunity from the power of the federal courts that is broader than the Amendment's literal text, States are shielded from suit in federal court by their own citizens as well as by citizens of other States or of foreign nations. *Hans*, 134 U.S. 1; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

Because the immunity from suit in federal court guaranteed by the Eleventh Amendment is a *right* of the State, it may, of course, be waived. *Atascadero*, 473 U.S. at 241. Moreover, like many other constitutional principles, it is not absolute: it yields when truly necessary to accommodate certain needs of the federal system established by the Constitution, both originally and as

12. Although the Eleventh Amendment speaks in terms of "one of the United States," this Court has held that the Amendment equally shields state agencies and state instrumentalities as "arms of the State." *Feeney*, 495 U.S. at 311; *Howlett v. Rose* 110 S. Ct. 2430, 2437 (1990); *Treasure Salvors, Inc.*, 458 U.S. at 684 ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity.") (citation omitted). The Authority's argument, although expressed in terms of "States," applies equally to claims of Eleventh Amendment immunity asserted by instrumentalities of the States.



amended.[13] Thus, immunity is subject to congressional abrogation with respect to at least some federal-law claims,[14] and in *Ex parte Young*, 209 U.S. 123 (1908), the Court adopted the fiction that a suit against state officials is not really a suit against the State where it seeks only to vindicate federal rights and to enjoin future violations.[15]

These narrow limitations on the immunity guaranteed the States by the Eleventh Amendment do not affect the absolute immunity afforded the States from diversity actions. Indeed, the care with which the Court has circumscribed any encroachment on state immunity under the Eleventh Amendment confirms the strength, as well as the fundamental importance, of the immunity itself. Thus, any legislative waiver of immunity must be clear and express, *Atascadero*, 473 U.S. at 241, and any congressional abrogation must be textually unequivocal,

13. The inapplicability of the Eleventh Amendment to this Court's appellate jurisdiction, *McKesson Corp. v. Florida Div. of Alcoholic Beverages*, 110 S. Ct. 2238, 2245 (1990), and to suits brought by the United States or by sister States, *Welch*, 483 U.S. at 487, are necessary incidents of the federal constitutional system. *See Blatchford*, 111 S. Ct. at 2583; *Monaco*, 292 U.S. at 328-29; L. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers, Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 685 (1976).

14. For example, the Congress can abrogate the States' immunity under laws enacted pursuant to the Fourteenth Amendment, which, by limiting the States' authority, necessarily modified their preexisting Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). This congressional power is, in turn, limited by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979). The Court also has held that the Congress can abrogate the immunity of the States with respect to claims under laws enacted pursuant to the Commerce Clause, with a plurality reasoning that the States had ceded this authority in the plan of the Convention. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

15. As the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1985), *Ex parte Young* adopted that fiction because otherwise there would be no way for the federal courts to ensure future State compliance with federal laws. *See also Edelman*, 415 U.S. at 668.

*Dellmuth v. Muth*, 491 U.S. 223, 227 (1989); *Blatchford*, 111 S. Ct. at 2584-85; *Atascadero*, 473 U.S. at 242. Similarly, the Court has refused to extend the *Ex parte Young* fiction beyond cases involving prospective relief under federal law, since the *Ex parte Young* rule concededly impairs Eleventh Amendment principles and that impairment cannot be justified beyond those cases. *Green*, 474 U.S. at 68; *Pennhurst*, 465 U.S. at 102-03; *Quern*, 440 U.S. at 337. As a result, claims for damages or other retrospective relief remain barred, *Edelman*, 415 U.S. at 668-69, as do any claims resting on state law, *Pennhurst*, 465 U.S. at 120-21, even when suits name state officials as defendants.

Where, as here, the suit is against an instrumentality of the State and is a diversity action seeking damages based solely on state law, there is no applicable limitation on Eleventh Amendment immunity from suit. Instead, the structural principle requiring state sovereign immunity from the judicial authority of the federal sovereign fully applies.

### B. The Eleventh Amendment Affords a Broad Immunity From Suit in Federal Court, Not a Limited Immunity From Judgment.

The Eleventh Amendment immunity is an immunity from *being sued*, not just an immunity from entry of judgments. As this Court long ago explained, "[t]he very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887). Where the immunity applies, it protects against suits from their inception.

The character of the immunity is established by the clear language of the Eleventh Amendment. It declares that "[t]he judicial power" does not extend to "any suit" that is "commenced or prosecuted" against States. It limits the entire judicial power, not just the power to



enter judgments. It applies to the entire "suit," not just to the order of relief. It specifically provides protection from the time the suit is "commenced" and during the time it is "prosecuted," not just when the case comes to an end and final judgment is entered.

This Court's earliest interpretations of the Eleventh Amendment confirm that it was specifically designed to restore and guarantee the States' sovereign immunity from being sued at all in federal court. In 1798, this Court addressed the immediate question whether federal courts could continue to hear pending cases against States that were initiated prior to the ratification of the Eleventh Amendment. A unanimous Court held that these cases must be dismissed, explaining "that the amendment being constitutionally adopted, there could not be exercised *any jurisdiction*, in any case, past or future, in which a state was sued by the citizens of another state . . . ." *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), *quoted in Hans*, 134 U.S. at 11 (emphasis added). Several years later, the Court stated in rather succinct terms: "The amendment simply provides, that no suit shall be commenced or prosecuted against a state. *The state cannot be made a defendant* to *a suit brought by an individual.*" *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139 (1809) (emphasis added).

More recently, this Court consistently has confirmed the decisions in these early cases on the effect of the Eleventh Amendment. The Court repeatedly has held that the Amendment is not concerned only with money judgments, but applies as well to claims for equitable relief. *Pennhurst*, 465 U.S. at 100-01; *Cory*, 457 U.S. at 90-91. The Court has observed that the immunity bars the federal courts from even entertaining such suits. *Pennhurst*, 465 U.S. at 98, 99 n.8 ("The limitation [of the Eleventh Amendment] deprives federal courts of any jurisdiction to entertain such claims . . . .").

This view follows from the basic purpose and history of the immunity. As the Court has held since *Hans*, the

Eleventh Amendment is significant, beyond its literal text, for its confirmation of the principle that the federal judicial power is limited by the structural respect due States as separate sovereigns in the federal system. The Court observed in *Monaco*, 292 U.S. at 322-23 (quoting Federalist No. 81) that the Amendment embodies the "postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' " The immunity thus protects against "the indignity" of the federal sovereign "subjecting a State" to its judicial authority, *Ex parte Ayers*, 123 U.S. at 505, and prohibits calling a State "to the bar of the federal court" and requiring it to answer and be judged there. *Welch*, 483 U.S. at 480 n.10 (plurality opinion). It is this character of the immunity that makes it a fundamental element of the constitutional *structure*, guaranteeing the proper constitutional balance of authority between the state and federal governments. *Blatchford*, 111 S. Ct. at 2585; *Atascadero*, 473 U.S. at 238.

Indeed, the immunity's effect of barring the federal sovereign's exercise of power over the States, rather than barring particular judgments against the States, is inherent in the scope and background of the Eleventh Amendment. The immunity guaranteed by the Amendment, after all, is not an immunity from the burdens of litigation or from judicial orders and awards: the Amendment gives States no protection against such burdens or judgments when imposed by *state* courts. *See Hilton v. South Carolina*, 112 S. Ct. 560, 565 (1991); *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979). Necessarily, the immunity is concerned only with *which* authority is holding the State to account; it preserves the States' freedom from compelled submission to *federal* court authority. That is why this Court has insisted that before a State can be found to have waived immunity, the waiver must specifically authorize suit in *federal* court,



not just in state court. *See Atascadero*, 473 U.S. at 241; *Feeney*, 495 U.S. at 305-06; *Pennhurst*, 465 U.S. at 99 n.9.

The immunity, in short, establishes a structural limit on the federal sovereign exercising its judicial authority over the States. While that structural limitation prohibits the federal courts from entering judgment against a State, it also prohibits the federal courts from exercising their extensive pre-judgment authority during the "commencement" and subsequent "prosecution" of suits against States.

## II.
## ORDERS DENYING CLAIMS OF ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT ARE IMMEDIATELY APPEALABLE AS COLLATERAL FINAL ORDERS

A district court order, though not a final judgment ending the litigation, nevertheless may be appealed under 28 U.S.C. § 1291 if it finally and conclusively determines a "claim of right separate from, and collateral to" the main action, and if the rights implicated by the order are too important to be denied review and are too independent of the action to defer appellate consideration until after trial. *Cohen*, 337 U.S. at 546. The Court has often explained the test that interlocutory orders must meet to be appealable under *Cohen*:

> To fall within the limited class of final collateral orders, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment."

*Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Given the nature of Eleventh Amendment immunity, it is clear that an order denying a claim of immunity from suit in federal court under the Eleventh Amendment satisfies each element of the *Cohen* test.



### A. An Order Denying a Claim of Eleventh Amendment Immunity From Suit in Federal Court Effectively is Unreviewable on Appeal From a Final Judgment on the Merits.

The First Circuit's determination that it did not have jurisdiction over the Authority's interlocutory appeal turned on the third element of the *Cohen* test.[16] The First Circuit concluded that the interests underlying the Eleventh Amendment immunity of the States " 'can be adequately vindicated upon an appeal from a final judgment.' " Pet. App. at A4 (quoting *Libby*, 833 F.2d at 407). In reaching its conclusion, the court explicitly relied on its earlier view of the Eleventh Amendment as protecting only against monetary judgments, as providing an immunity critically different from the immunity from federal suit available to state officials, and as no longer providing States with a "right not to stand trial" after *Ex parte Young*. *Id*. The First Circuit's view is wrong.

#### 1. The Eleventh Amendment is a Shield from Suit, Not Merely a Shield Against Monetary Judgments.

In the First Circuit's view, the Eleventh Amendment protects no more than the States' narrow interest in avoiding monetary judgments:

> The damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief. Only if the state is forced to use funds from the state treasury to satisfy a compensatory judgment do the adverse consequences that the Eleventh Amendment prohibits occur.

*Libby*, 833 F.2d at 406.

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16. The First Circuit has declared that the third prong of the *Cohen* collateral order test should be the " 'central focus' and perhaps even the 'dispositive criterion.' " *Rodriguez v. Banco Cent.*, 790 F.2d 172, 178 (1st Cir. 1986) (quoting *In re San Juan Star Co.*, 662 F.2d 108, 112 (1st Cir. 1981)).

That view simply misapprehends the nature of the Eleventh Amendment and the protection it affords States. The Eleventh Amendment is not narrowly concerned with the practical effect of monetary judgments. It extends much more broadly to guarantee that suits may not be "commenced or prosecuted" in federal court against a State, whatever the type of relief sought by the plaintiff. It furnishes that guarantee to preserve the necessary independence of States as sovereigns from the judicial power of the federal government.

This structural guarantee of the Eleventh Amendment is thwarted, and the sovereign interests it protects are impaired, whenever a federal court exercises authority over States beyond what is necessary to decide the immunity question itself. Compelled pretrial proceedings and the conduct of a trial itself are as much an exercise of the "judicial power of the United States" as is the entry of a judgment. Involuntary subjection of States to such a process impairs the immunity as much as an adverse judgment. Indeed, to conclude otherwise would be to treat the immunity as not implicated in any case where a State ultimately prevails on the merits – a restriction wholly at odds with the character of the immunity as a restriction on suits "commenced or prosecuted" against the States in federal court.

The Eleventh Amendment thus guarantees the States a right not to stand trial or to be subjected to any proceedings in the federal courts. Of course, that right is irrevocably lost if a district court erroneously denies a claim of Eleventh Amendment immunity and compels the State to proceed through discovery, trial, and judgment before an appeal can be taken. A post-judgment appeal gives the States no way to vindicate the right to be free from the pre-judgment process.

Thus, this Court repeatedly has recognized that orders depriving a litigant of a right not to be tried are effectively unreviewable on appeal from a final judgment.



> [D]eprivation of the right not to be tried satisfies the *Coopers & Lybrand* requirement of being "effectively unreviewable on appeal from a final judgment." . . . A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur . . . .

*Midland Asphalt Corp.*, 489 U.S. at 800-01 (citations omitted). *See also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988). An order denying an Eleventh Amendment claim of constitutional immunity not to stand trial comes squarely within that description.

Indeed, six circuits other than the First have addressed this issue. All have held that claims to Eleventh Amendment immunity from suit are claims to an "entitlement not to stand trial" and, therefore, that orders denying such claims may be appealed immediately under *Cohen*.[17] Similarly, in a directly analogous context, every circuit that has addressed the issue under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-10, has ruled that orders denying sovereign immunity to a foreign government or its instrumentality are immediately appealable as collateral final orders under

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17. *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 377 (1991); *Chrissy F. v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 848-49 (5th Cir. 1991); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001, *4 (6th Cir. July 2, 1991), *cert. denied on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 112 S. Ct. 1162 (1992); *Schopler v. Bliss*, 903 F.2d 1373, 1377 (11th Cir. 1990) (per curiam); *Dube v. State Univ.*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied* 493 U.S. 976 (1989); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Minotti v.Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987).

*Cohen*.[18]

**2. The Eleventh Amendment Grants a Right Not to Stand Trial Directly Analogous to Such Rights Already Recognized by This Court.**

Because the Eleventh Amendment protects States against the federal judicial power, its guarantee gives States a right not to stand trial directly analogous to the rights not to stand trial already recognized by this Court. The Court has found such a right in three areas: Speech and Debate Clause immunity, *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979); double jeopardy immunity, *Abney v. United States*, 431 U.S. 651, 662 (1977); and immunity of state and federal government officials, *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982). As noted above, where the Court has found such a right, it has held that the right cannot be vindicated if appeal must await final judgment. *See Midland Asphalt Corp.*, 489 U.S. at 800-01.

The First Circuit sought to distinguish a claim of Eleventh Amendment immunity from the claims at issue in those cases. Focusing on *Mitchell*, the First Circuit reasoned that a State's interest in Eleventh Amendment immunity was critically different from the

18. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991), *cert. granted on other grounds*, 112 S. Ct. 858 (1992); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Compania Mexicana de Aviacion, S.A. v. United States District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 816 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Reale Int'l, Inc. v. Federal Republic of Nigeria*, 647 F.2d 330, 331 & n.4 (2d Cir. 1981).



interest of a public official in asserting qualified immunity: "[T]he qualified immunity defense available to individual state actors is not, from either a conceptual or a practical standpoint, congruent with the Eleventh Amendment defense available to unconsenting states and state agencies." Pet. App. at A4.

The First Circuit's analysis simply confuses the *reason* for the right with the *nature* of the right. Here, as in *Mitchell*, 472 U.S. at 526 (and as in *Abney*, 431 U.S. at 659 and *Helstoski*, 442 U.S. at 507-08), the right at stake is a right not to stand trial. In those cases, of course, the predominant reason for the right is a concern to protect the particular defendants against litigation burdens and costs (either to avoid chilling the defendants' conduct, *Helstoski*, 442 U.S. at 507-08; *Mitchell*, 472 U.S. at 520-23, or to prevent harassment of the defendants, *Abney*, 431 U.S. at 661-62).[19] In the Eleventh Amendment context, the predominant concern instead is structural — the necessary independence of one sovereign from the judicial authority of another.[20]

19. Even in those situations, however, the rights involved by no means guarantee against *any* trial based on the defendant's conduct. A criminal defendant, for example, although protected by the Double Jeopardy clause against a second trial for the same offense, may well be subject to prosecution for a different crime based on other facts relating to the same conduct, *Blockburger v. United States*, 284 U.S. 299 (1932), or may be prosecuted by a separate sovereign in its own court, *Heath v. Alabama*, 474 U.S. 82 (1985). Similarly, the absolute or qualified immunity enjoyed by state and federal government officials in civil actions does not immunize them from criminal prosecutions based on the same conduct. *United States v. Gillock*, 445 U.S. 360, 372 (1980) (recognition of immunity from civil suits for state officials has "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials."). Nor does immunity of state officials from section 1983 actions protect them from state-law suits based on precisely the same conduct. *See, e.g., Martinez v. California*, 444 U.S. 277 (1980).

20. Concerns with litigation burdens are present here as well, however. When a State is sued in its own courts it can control the burdens by defining the terms on which it may be sued. Suit in

But the *right* is the same in both cases – a constitutional right not to be subjected to specific federal court proceedings.

In all these cases, the very harm that the pertinent immunity is intended to prevent occurs whenever a trial goes forward against a defendant entitled to the immunity. This right cannot be vindicated fully if an appeal must await the conclusion of the federal trial, which the immunity, if given effect, would have prevented. As this Court said in *Mitchell*, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526.

### 3. The Eleventh Amendment Continues to Shield States From Suit in Federal Court After *Ex Parte Young*.

In the decision being appealed, the First Circuit explicitly relied upon an earlier decision in which it held that *Ex parte Young*, 209 U.S. 123, fundamentally changed the nature of Eleventh Amendment immunity so that it no longer shields States from suit in federal court. Pet. App. at A4 (citing *Libby*, 833 F.2d at 404-07). In *Libby*, the First Circuit reasoned:

> To posit . . . that the essence of sovereign immunity is an immunity from trial itself, is to overlook the reality of the *Ex parte Young* exception to the Eleventh Amendment. . . . [B]ecause of *Ex parte Young*, a state has to "stand trial" whenever a *Young*-type case – a suit against [a state] official in his official capacity to remedy a violation of federal law – is brought against it. . . . Since the state is subjected to this not inconsiderable burden in a *Young* action, it cannot be convincingly argued

federal court makes any such control problematic at best and impossible at worst.



> that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial.

*Libby*, 833 F.2d at 406. But this analysis wholly misunderstands the meaning and significance of *Ex parte Young*.

*Ex parte Young* did not change the nature of Eleventh Amendment immunity where it applies; rather, it merely limited the circumstances where the immunity applies in the first instance. Indeed, all *Ex parte Young* did was to limit who may claim the immunity that belongs to the State. It did not alter the nature of the immunity for those defendants, like state agencies, that clearly may claim it.

The First Circuit's reasoning rests upon the simple error of confusing the question of who may qualify as the "State" for immunity purposes with the question of what effect of the immunity has for those entitled to it. Nothing in *Ex parte Young* changes the textually explicit or structurally necessary character of Eleventh Amendment immunity. When the immunity applies, it protects States against suits from the time they are "commenced."

It would be inconsistent with the basis of *Ex parte Young* to read it as limiting the nature of Eleventh Amendment immunity where that immunity exists, as in the present case. *Ex parte Young* rests on a "fiction" adopted as an exception to the States' otherwise blanket immunity from federal court jurisdiction. The fiction was necessary because of "the need to promote the supremacy of federal law." *Pennhurst*, 465 U.S. at 105; *Green*, 474 U.S. at 68. Recognizing its exceptional character and the distinctive federal needs that justify it, the Court specifically has "declined to extend the fiction of *Young*" beyond the limited circumstances where *prospective* relief is sought on the basis of a violation of *federal* law by individual state officials. *Pennhurst*, 465

U.S. at 105; *see also Quern*, 440 U.S. at 338; *Green*, 474 U.S. at 68; *Pugh*, 438 U.S. at 782.

The decision in *Ex parte Young*, therefore, cannot properly be used to constrict the protection of the Eleventh Amendment where it clearly applies – a case not brought against state officers, not invoking federal law, and not seeking any prospective relief. Thus, the narrow exception to a State's immunity from trial in the federal courts set down in *Ex parte Young* has no effect on the Authority's asserted right not to stand trial in federal Court.

**B. Orders Denying Claims of Immunity Under the Eleventh Amendment Conclusively Determine the Issue Being Appealed.**

When a district court denies a motion to dismiss, holding that the defendant has no Eleventh Amendment immunity, it has denied a state defendant's right not to be compelled to submit to the jurisdiction of the federal court. Unless the order denying the claim expressly leaves the question open, the order conclusively determines the claim of right being appealed. "[I]t is apparent that '*Cohen's* threshold requirement of a fully consummated decision is satisfied' " when an order denies a claim of right not to stand trial. *Mitchell*, 472 U.S. at 527 (quoting *Abney*, 431 U.S. at 659).

In this case, the district court order simply denied the Authority's motion to dismiss and left no further steps for the Authority to take to avoid compelled discovery and trial. The order conclusively determined the Eleventh Amendment immunity question.



**C. Orders Denying Claims of Eleventh Amendment Immunity Resolve an Important Question Separate and Distinct From the Merits of the Action.**

**1. Eleventh Amendment Issues Are Separate From the Merits of the Underlying Action.**

The issue whether a State is entitled to Eleventh Amendment immunity from a diversity action in federal court obviously is separate from the merits of the underlying action. A claim to Eleventh Amendment immunity in such a case depends on (1) whether the defendant is the State (or is an "arm of the State"), (2) whether its claim to Eleventh Amendment immunity was waived, and (3) whether the Congress abrogated the defendant's immunity in that case. None of these issues typically would bear any relation to the substantive issue in the case – whether particular obligations under state law have been breached.[21]

In this case, for example, whether the Authority is entitled to Eleventh Amendment immunity from suit in federal court depends on whether the Authority is an instrumentality of the Commonwealth of Puerto Rico. The answer to that question primarily depends on local statutes and decisions defining the status of the Authority and its relationship to the Commonwealth,[22] and secondarily on such factors as the source of payment of any judgment. *Ainsworth*, 818 F.2d at 1037. Those

21. In a different context, cases brought under federal law against state officials where the defendant's entitlement to Eleventh Amendment immunity may turn on the question whether the relief ultimately awarded is prospective or retrospective. In such a case, a pre-trial motion claiming immunity may not be "separate" from the merits, but the district court typically would not "conclusively determine" the immunity issue prior to judgment in any event. This, of course, is not such a case.

22. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 339 n.6 (1986) ("A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico.") (citing *Diaz v. Gonzalez*, 261 U.S. 102, 105-06 (1923) (Holmes, J.)).

factors have nothing to do with the issue whether the Authority's contract with M&E was breached, or the amount of damages, if any, incurred by the Authority or by M&E.

A claim to Eleventh Amendment immunity is thus much more "conceptually distinct," *Mitchell*, 472 U.S. at 527, and therefore clearly separate from the merits of the underlying action than is a claim of qualified official immunity. The latter often involves both the "plaintiff's factual allegations" and the plaintiff's legal claims since qualified immunity turns on whether the asserted legal right was clearly established. *Id.* at 529. Yet, this Court in *Mitchell* found that the claim to qualified immunity was wholly separate from the merits of the underlying action for the purpose of the *Cohen* test. *Id.* It follows, *a fortiori*, that a claim to Eleventh Amendment immunity is separate from the merits of the underlying action for the purposes of the *Cohen* test. *See id.* at 528-29 ("[T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test . . . .").

**2. Eleventh Amendment Rights Are Too Important to Be Denied Interlocutory Review.**

In *Cohen*, the Court observed that, for an interlocutory order to be immediately appealable, the rights implicated by the order should be "too important to be denied review . . . ." *Cohen*, 337 U.S. at 546. More recently, Justice Scalia has written that "[t]he importance of the right asserted has always been a significant part of our collateral order doctrine." *Lauro Lines S.R.L.*, 490 U.S. at 501 (Scalia, J., concurring). There can be no question that the Eleventh Amendment meets this criterion.

On numerous occasions this Court has described the Eleventh Amendment's role as " 'an essential component of our constitutional structure,' " *Blatchford*, 111 S. Ct. at 2585 (quoting *Dellmuth*, 491 U.S. at 227-28).



The Court has said that the Eleventh Amendment declares a policy and sets forth a limitation on federal judicial power of "compelling force," *Ford Motor Co. v. Indiana Dep't of Treasury*, 323 U.S. 459, 467 (1945), and has stressed "that abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.'" *Dellmuth*, 491 U.S. at 227 (quoting *Atascadero*, 473 U.S. at 238 and *Pennhurst*, 465 U.S. at 100).

The fundamental character of the immunity is reflected throughout the Court's Eleventh Amendment doctrine. It underlies the basic principle that the immunity is broader than the text of the Amendment, and the Court's insistence that the *Ex parte Young* fiction be limited to what is strictly necessary in the federal system. The importance of the immunity is reflected also in the "clear statement" rules limiting waiver or abrogation of a State's Eleventh Amendment immunity – the requirement of "an unequivocal expression" of congressional or state intent to " 'overturn the constitutionally guaranteed immunity of the several states.' " *Pennhurst*, 465 U.S. at 99 (quoting *Quern*, 440 U.S. at 342). *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 75 (1989).

Given our constitutional system, an order denying a State's right to immunity from federal court jurisdiction involves a right important enough to merit interlocutory appellate review.

## CONCLUSION

The decision of the First Circuit should be reversed and the case remanded with instructions to review the merits of the Authority's appeal from the district court's denial of its claim to Eleventh Amendment immunity.

Respectfully submitted,

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(11)

No. 91-1010



IN THE

# Supreme Court of the United States

October Term, 1991

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PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Petitioner,*

v.

METCALF & EDDY, INC.,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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## BRIEF OF RESPONDENT

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## QUESTION PRESENTED

Whether the denial of a claim of Eleventh Amendment immunity asserted by a Puerto Rican public corporation can be effectively reviewed on appeal from final judgment?

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IN THE

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No. 91-1010

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Petitioner,*

vs.

METCALF & EDDY, INC.,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## BRIEF OF RESPONDENT

Respondent, Metcalf & Eddy, Inc. ("M&E"), requests that this Court affirm the First Circuit's decision in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). Petitioner, an autonomous Puerto Rican public corporation, sought dismissal in the district court on the ground that it was entitled to Eleventh Amendment immunity. The district court denied the motion. The First Circuit properly refused to hear an interlocutory appeal from this ruling,

holding that Petitioner's claim could be effectively reviewed on appeal from final judgment. The First Circuit's decision should be affirmed and this case remanded to the district court for trial.[1]

## STATEMENT OF THE CASE

### I

### PARTIES TO THIS CASE

The Puerto Rico Aqueduct and Sewer Authority ("PRASA") is a public corporation, separately incorporated under Puerto Rican law. It supervises and oversees the distribution and treatment of water and wastewater in Puerto Rico. C.A. App. 5. By statute, PRASA's financial obligations are not debts of the Commonwealth of Puerto Rico. P.R. Laws Ann. tit. 22, § 144 (1988); *see also* C.A. App. 65 (prospectus representing that PRASA bonds are not debts of the Commonwealth). PRASA is "autonomous" and has "complete control and supervision of its properties and activities." P. R. Laws Ann. tit. 22, §§ 142, 144(j) (1988). It must pay its debts out of its own funds and set its rates and charges so as to fund, with a safety margin, the maintenance, repair, and

1 Discovery is substantially completed, motions for summary judgment have been filed, and the case is virtually ready for trial.



operation of its water and wastewater systems. P. R. Laws Ann. tit. 22, §§ 144, 158. It is prohibited from pledging the credit or the taxing power of the Commonwealth. *Id.*, § 144. PRASA may borrow money, issue revenue bonds, enter into contracts, and sue and be sued in its corporate name. *Id.*, § 144 (c), (d), and (g).

The courts of the Commonwealth of Puerto Rico have consistently treated PRASA as a private enterprise.[2] The Supreme Court of Puerto Rico has concluded that PRASA was "unquestionably framed as a private enterprise or business and in fact operates as such." *A.A.A. v. Union de Empleados A.A.A.*, 105 P.R. Dec. 437, 456-57, 5 O.T. 602, 628 (1976). After considering the statutory provisions that created PRASA, the Commonwealth's Supreme Court found that PRASA "enjoys an extraordinary fiscal and administrative autonomy. Its structure, as well as its powers and authorities, are basically similar to those of a private enterprise." 105 P.R. Dec. at 456, 5 O.T. at 627. The Commonwealth's Supreme Court held that an "overwhelming combination of factors [lead] to the

2 Similarly, the First Circuit has twice suggested that PRASA is not an arm of the Commonwealth. *See* Pet. App. A-12 ("substantial doubt" that PRASA is an arm of the State); *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (expressing "doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment"), *cert. denied*, 469 U.S. 1191 (1985).

conclusion that [PRASA] operates as a private enterprise or business." 105 P.R. Dec. at 457, 5 O.T. at 629; *see also Canchani v. C.R.U.V.*, 105 P.R. Dec. 352, 356-57, 5 O.T. 485, 489-90 (1976) (PRASA has "judicial personality *independent* of the Commonwealth of Puerto Rico") (emphasis in original); *Arraiza v. Reyes*, 70 P.R.R. 583, 586-87 (1949) (reviewing evidence of PRASA's autonomy and concluding "the Legislature clearly indicated its intention to the effect that this authority would be as amenable to judicial process as any private enterprise would be under like circumstances").

M&E is a corporation[3] internationally renowned for its expertise in wastewater treatment services. C.A. App. 4-5. It has provided such services to various federal, state, and private entities, as well as to public corporations operating as private enterprises, such as PRASA. *Id.* 5.

## II.

## BACKGROUND TO THIS CASE

The relationship between M&E and PRASA arose out of an enforcement action brought against PRASA by the United States Environmental Protection Agency ("EPA").

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3 M&E's list of parent companies pursuant to Supreme Court Rule 29.1 was included in its Brief in Opposition to the petition for a writ of certiorari at 2 n.1.



In 1985, the EPA suit culminated in a Consent Order (modified in 1988) that, among other things, required substantial improvements to PRASA's eighty-three existing wastewater treatment plants and restricted additional sewage connections to thirty-eight of these plants. C.A. App. 6-7.

PRASA and M&E executed a contract in March 1986 under which M&E agreed to provide project management services for the Consent Order's rehabilitation work. *Id.* 9. M&E immediately began providing those services to PRASA and, over the succeeding several years, met all deadlines established in the Consent Order. *Id.* 10-12.

## III.

## PROCEDURAL HISTORY OF THIS CASE

In September 1990, after PRASA had failed to pay over $37 million due under the contract, principally for monies advanced by M&E to outside contractors and others on PRASA's behalf, M&E commenced this lawsuit in the United States District Court for the District of Puerto Rico.

M&E fully performed its obligations under the contract. PRASA has claimed no defects in M&E's workmanship, in the equipment supplied by M&E, or in the workmanship of Puerto Rican subcontractors hired and paid directly by M&E. Rather than face the

overwhelming merits of M&E's claims, and left with only technical defenses, PRASA has, in the words of the First Circuit, "mounted a furious campaign to avoid joining issue." Pet. App. A–2.[4]

PRASA did not assert any Eleventh Amendment claims immediately after suit was filed. Indeed, for almost six months, PRASA made no objection to the federal court's exercise of judicial power and, apparently forgetting that it viewed itself to be an "arm of the State," made no claim that the Eleventh Amendment precluded federal court authority over the early aspects of this suit.[5] Instead, PRASA itself invoked the federal court's authority by moving to dismiss on the sole substantive ground that M&E had failed to join an indispensable

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4 Petitioner may have a preference for the Commonwealth courts and proceedings which are conducted in Spanish, see Pet. Br. at 5 n.6, but the reasons it states are, at best, disingenuous and, at worst, highly misleading. All of PRASA's witnesses are, in fact, bilingual in English and Spanish (only a handful requested a translator for their depositions), all of M&E's witnesses are English speakers, the contract at issue is in English, the underlying EPA Consent Order is in English, and the bulk of the deposition exhibits and other documents to be used at trial as exhibits are in English. Frankly stated, the only reason for Petitioner's preference for the Commonwealth courts is its hope that local prejudice against M&E will lessen the chance of a loss on the merits.

5 Not surprisingly, PRASA has not been represented by the Attorney General of the Commonwealth of Puerto Rico at any stage of the proceedings in this case.



party. After full briefing by both parties and a hearing before the Court, the district court denied that motion.

In February 1991, PRASA moved for reconsideration of its indispensable party motion. In the same pleading, filed months after the lawsuit was initiated, PRASA first raised its claim that the action should be dismissed on the ground that it was immune from suit under the Eleventh Amendment. Both PRASA and M&E submitted affidavits and documents regarding the merits of PRASA's Eleventh Amendment claim. *Id.* 37-140, 162-65. The district court denied PRASA's motion for reconsideration and dismissal, noting PRASA's "ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds." Pet. App. A-9.

In June, 1991, PRASA appealed from the denial of its motion to dismiss on the ground of Eleventh Amendment immunity. Shortly thereafter, it requested a stay of the district court proceedings until the appeal was decided. On June 28, 1991, the First Circuit denied PRASA's application for a stay, ruling that PRASA had demonstrated neither a probability of success on the merits nor a threat of irreparable injury and that there was "substantial doubt" that "PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh

Amendment." *Id.* A-12 (quoting *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985)).[6]

After its motion for a stay was denied, PRASA engaged in substantial discovery. Between August and November, 1991, PRASA served several sets of written discovery and required M&E to produce more than one million documents. From October 1991 through February 1992, PRASA took twenty-eight depositions of M&E's current and former employees in more than half a dozen different cities across the country.

## IV.

## THE OPINION BELOW

The First Circuit refused to consider PRASA's interlocutory appeal. Relying on its prior opinion in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the First Circuit applied the collateral order doctrine set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and concluded that the interlocutory order at issue could be effectively reviewed on appeal from a final judgment. *See Libby*, 833 F.2d at 403-04.

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6 Unlike the other public corporations referred to by Petitioner, see Pet. Br. at 2-3 and n.3, PRASA has never been held to be entitled to immunity under the Eleventh Amendment.



## SUMMARY OF ARGUMENT

Petitioner's and *amici's* assertion of the right of States not to be subject at all to the federal judicial power rests upon sweeping notions of federalism and the States' failure to surrender their full sovereignty upon joining the Union. The instant assertion of that right appears entirely too broad in light of this Court's interpretation and application of the core principle of the Eleventh Amendment -- a right to be immune from liability. Moreover, Petitioner's expansive rationale surely does not apply to the exceptionally narrow issue presented by this case: whether an autonomous public corporation created by an entity other than a State has a right not to stand trial at all before a federal court.

Neither the notions of sovereign immunity invoked by Petitioner and *amici* nor the "plan of the Convention" to which they repair contemplate the States authorizing business entities to operate as autonomous public corporations. The Eleventh Amendment does not apply to local park, library or school boards, or even to municipal or county political subdivisions, and it is surely not offended by denying extraordinary interlocutory review to autonomous public corporations.

Moreover, Petitioner's sovereignty and federalism arguments do not apply to entities, like Puerto Rico, which are not States and which owe their existence (and sovereignty, if any) solely to Congress. Eleventh Amendment immunity is available by its terms only to "one of the United States," and this Court has never held that any territory or possession falls within the Amendment's scope. None of the several Congressional enactments relating to Puerto Rico, or to territories or possessions generally, extends the Eleventh Amendment to Puerto Rico. Puerto Rico is a creature of the federal government, subject to Congressional prerogatives, and a suit in federal court against such an entity does not raise any federalism concerns. Only Congress may restrict the jurisdiction which Article III otherwise confers on the lower federal courts. If the judicial power of Article III is to be restricted, it should only be done by explicit Congressional action, and not be inferred by this Court from general pronouncements.

This case can be decided without reaching any of these issues, however, for Petitioner has waived any right not to be tried in federal court. By initially asking the federal court to dismiss this case on grounds other than the Eleventh Amendment, PRASA unconditionally invoked the judicial power of the United States. It has thus waived



any claim that it is immune from suit altogether, and must await appellate review of its Eleventh Amendment claim following entry of a final judgment by the court below.

## ARGUMENT

### INTERLOCUTORY APPELLATE REVIEW IS NEITHER NECESSARY NOR APPROPRIATE

Piecemeal review is strongly disfavored. Appeals may be taken only from "final decisions of the district courts." 28 U.S.C. § 1291 (1988). A party generally cannot appeal until a district court decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

This Court has recognized a narrow exception to § 1291 in the collateral order doctrine. Under this doctrine, interlocutory appeal is allowed for that "small class" of prejudgment orders that conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also*

*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

An order is "effectively unreviewable" only where it "involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). The order must be such that unless it is reviewed on an interlocutory basis, "it never can be reviewed at all." *Stack v. Boyle*, 342 U.S. 1, 12 (1952) (opinion of Jackson, J.). The prejudgment order in this case does not meet this test.

**1. The Eleventh Amendment Does Not Create a Right Not to Be Tried; It Grants Immunity from Liability, Not Immunity from Suit.**

A right not to be tried in the sense relevant to the *Cohen* exception requires "an explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt*, 489 U.S. at 801 (emphasis added).[7] Such

[7] Petitioner recites this language but fails to apply it. *Cf.* Pet. Br. at 19-22. Some *amici* totally disregard this language and tell the Court to consider "the way that the right is commonly understood." Br. of the Council of State Govt's, *et al.*, at 15. Petitioner's and *amici's* apparent trepidation in dealing with *Midland Asphalt* is understandable, because the Eleventh Amendment does not provide the explicit guarantee that is required.



a guarantee exists in the Constitution's Double Jeopardy Clause, *Abney v. United States*, 431 U.S. 651 (1977), and in the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979), both of which explicitly foreclose any possibility of trial. *See* Double Jeopardy Clause, U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); Speech or Debate Clause, U.S. Const. art. I, § 6 ("for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place").

The Eleventh Amendment contains no explicit guarantee against trial. Petitioner's invocation of an alleged right not to be tried rests on a "word game" that this Court has soundly rejected. *Midland Asphalt*, 489 U.S. at 801 ("In one sense, any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss . . ."); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (meritorious claim for dismissal is not necessarily a right not to be tried).

The Eleventh Amendment provides immunity against liability, but it does not grant a comprehensive immunity against suit. This Court has recognized that, in an action for money damages like this one, the fundamental Eleventh Amendment interest at stake is

the prohibition on the use of State funds to satisfy a judgment. That core interest has been forcefully enunciated in the decisions of this Court. *E.g., Hafer v. Melo*, 112 S. Ct. 358, 364 (1991) (quoting *Edelmann v. Jordan*, 415 U.S. 651, 663 (1974)) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"); *Quern v. Jordan*, 440 U.S. 332, 337, 346-47 (1979) (question framed as whether order at issue "constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury'"); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945) ("when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest"); *see also Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).[8]

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[8] The Eleventh Amendment is not, in theory or in practice, a prohibition of all trials, or even all liability, involving States, State officials, or State agencies. *See Hafer*, 112 S. Ct. at 364 (Eleventh Amendment does not provide an absolute "shield" or "barrier" to suit against state officials). A State effectively stands trial whenever a case is brought under *Ex Parte Young*, 209 U.S. 123 (1908), against a state official in his official capacity to remedy a violation of federal law. *See Libby*, 833 F.2d at 406. While Petitioner blithely pretends that *Ex Parte Young* means nothing, *cf.* Pet. Br. at 23, that decision has subjected States, their agencies, and their officials to considerable litigation burdens. Given these burdens, the Eleventh Amendment cannot accurately be viewed as a categorical entitlement not to stand trial at all.



That central protection has been given additional force by the courts of appeals. To determine whether entities are arms of States protected by the Eleventh Amendment, the courts of appeals focus most heavily on whether State funds will be used to satisfy a judgment. *See, e.g., Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034, 1037 (1st Cir. 1987) ("the most important [factor] is whether . . . the payment of the judgment will have to be made out of the state treasury"); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991) ("the source from which the sums sought by plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction") (citations omitted); *see also, Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440-41 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). As the entity raising an Eleventh Amendment defense appears less and less like a State, the applicability of the Amendment becomes less and less certain. To determine these defenses, district

courts must consider factors that often will not even be amenable to consideration until discovery (and in some cases, a trial) is completed.

The principal protection of the Eleventh Amendment -- immunity from liability -- can be adequately vindicated on appeal from a final judgment.[9] Indeed, because the Amendment operates like a jurisdictional provision, this Court has said that an "Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelmann v. Jordan*, 415 U.S. 651, 678 (1974). *See also Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Green v. Mansour*, 474 U.S. 64, 68, 71 (1985) (referring to the Eleventh Amendment limitation on the Art. III power of the federal courts); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (Eleventh Amendment demonstrates that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III").

Jurisdictional defenses, contrary to *amici's* suggestion, *cf.* Br. of Council of State Gov'ts, *et al.*, at 13-14, do not typically receive procedural preeminence, but almost

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9 In exceptional cases, often at a party's request, district courts may certify the issue under 28 U.S.C. § 1292(b) (1988), a potential avenue of relief not pursued by Petitioner in this case.



invariably must await vindication until after final judgment. *See, e.g., Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (forum selection clause); *Catlin*, 324 U.S. at 236 (denials of motions to dismiss based on jurisdictional grounds are not immediately appealable). Like a claim that a federal court lacks subject matter jurisdiction under Article III, a claim that a federal court lacks jurisdiction based upon the Eleventh Amendment can always be reviewed on appeal.

Under the analysis of PRASA and *amici*, even a patently insubstantial claim of "immunity" would give a defendant, however far from being an arm or alter ego of a State, the right to disrupt proceedings by demanding interlocutory review. Neither *Mitchell v. Forsyth*, 472 U.S. 511 (1985), nor *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), upon which PRASA and *amici* rely, goes so far. *Nixon* involved a matter of singular importance, the scope of presidential immunity, that is not relevant here. *Mitchell* involved a claim, the assertion of qualified immunity, that raises concerns not presented by an Eleventh Amendment defense. The qualified immunity doctrine grants immunity from suit because pernicious consequences attend lawsuits against individuals. Such lawsuits inhibit officials in the exercise of their discretion, disrupt them in the performance of their duties, and deter

others from entering public service. It was these factors that led the Court to allow interlocutory review of denials of claims of qualified immunity.[10] These consequences do not occur in suits against States or arms of States and do not counsel the same result for a claim of Eleventh Amendment immunity. *See Hafer*, 112 S. Ct. at 365 (concern that imposing liability on state officers could hamper their performance of public duties is "properly addressed within the framework of our personal immunity jurisprudence" and not the Eleventh Amendment).

**2. PRASA Has Waived Any Claim of Immunity from Suit.**

Even if the Eleventh Amendment gives Petitioner a right to be immune from suit in federal courts, PRASA

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10 Contrary to Petitioner's claim, *cf.* Pet. Br. at 21, the First Circuit carefully analyzed both the nature of the claimed defense of qualified immunity and the reasons it should be the subject of immediate interlocutory review. Moreover, the predominant reason for the qualified immunity defense is emphatically not to protect those individuals from litigation costs. *Cf. id.* This Court has always "declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." *Lauro Lines S.R.L.*, 490 U.S. at 499. Petitioner's reliance upon litigation costs to justify immediate appeal is thus unavailing.



has waived that right.[11] The analysis presented by both Petitioner and *amici* suggests that the Eleventh Amendment provides two distinct rights: a right to avoid trial and a right not to be subject to a federal court judgment. Pet. Br. at 18; Br. of the Council of State Gov'ts, *et al.*, at 18. By moving to dismiss for failure to join an indispensable party before moving to dismiss on Eleventh Amendment grounds, Petitioner has waived any claim to the former right.[12]

Petitioner itself contends that the alleged immunity from suit encompasses a right not to be subject to the exercise of a federal court's authority "beyond what is necessary to decide the immunity question itself." Pet. Br. at 18. Assuming arguendo that this is a correct view of Eleventh Amendment immunity, such a right would bar the federal court from considering or deciding any matters not directly relating to the Eleventh Amendment. A

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11 This Court may consider this question, even though it was not raised below, because the issue of PRASA's waiver of its alleged immunity from suit may be decided on the basis of the record developed below. Moreover, PRASA's waiver is simply an additional basis for affirming the judgment of the First Circuit. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24. (1982).

12 That PRASA initially moved to dismiss on the sole ground of failure to join an indispensable party was noted in the Brief in Opposition at 5. Petitioner has not waived its right to raise its Eleventh Amendment claim of immunity from liability on appeal from a final judgment. Respondent has stipulated that Petitioner has preserved that right. *See* Br. in Opp. at 12 n.6.

waiver of this right would thus occur whenever a defendant seeks or consents to the federal court's exercise of its authority with respect to matters beyond that necessary to decide the immunity question. *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (waiver by state statute or state constitutional provision exists where there is "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment").

Petitioner here not only consented to the federal court's exercise of such authority, it affirmatively invoked that authority itself, unqualifiedly, months before making any assertion of Eleventh Amendment immunity. On October 26, 1990, PRASA filed a Motion to Dismiss the Complaint for failure to join an indispensable party, submitting in support of its motion two memoranda, exhibits, and a lengthy affidavit.[13] In so moving, PRASA requested that the court exercise jurisdiction that is wholly inconsistent with its claimed immunity from suit. It was only after the federal court exercised its Article III power at PRASA's behest, considered PRASA's own lengthy

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13 While its indispensable party motion was pending, and before it filed its Eleventh Amendment motion, PRASA also produced documents in discovery and certain of its employees for oral depositions.



submissions, held a hearing on PRASA's motion, and issued a ruling on the merits thereof, that PRASA decided to claim that the federal judicial power could not be exercised over this suit at all. PRASA has thus waived its alleged right not be tried.

### 3. No Justification Exists for Interlocutory Review of The Eleventh Amendment Claims of Autonomous Public Corporations.

The Eleventh Amendment does not extend to counties, municipalities, and other political subdivisions. These entities, while territorially part of a State, are corporations created by the State with such powers as are given them by the State. They are "part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *see also Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (local school board created by State law operates more like county or city than arm of the State and is not entitled to Eleventh Amendment immunity). That such corporations are subject to federal jurisdiction notwithstanding the Eleventh Amendment the Court has found "beyond question." *Luning*, 133 U.S. at 530.

Petitioner and *amici* rely upon broad notions of federalism that, they assert, derive from preexisting notions of sovereign immunity only partially surrendered by the States in the "plan of the Convention." These grand invocations of sovereignty, however, pale significantly when it is not the State itself that is called to answer in federal court. Indeed, when the defendant is neither the State nor even one of its branches or departments, but merely an autonomous public corporation authorized to operate in that business form by the State, any remnant federalism concerns of the sort invoked here by Petitioner and *amici* are far too attenuated to be given credence. If true political subdivisions like counties and municipalities, which directly perform the governmental powers of the State at the regional or local level, may properly be denied Eleventh Amendment immunity, *see Luning*, 133 U.S. at 530, that Amendment is in no meaningful sense offended merely by making the Eleventh Amendment claim of a public corporation wait until the entry of final judgment before being given appellate review. There is no compelling reason why such corporations, which mimic private enterprises, should be allowed extraordinary interlocutory review. Rather, like private litigants with jurisdictional defenses, autonomous public corporations



must have their defenses determined on appeal from final judgment.

Indeed, this Court long ago intimated that public corporations, much like counties, municipalities, and political subdivisions, are not shielded by Eleventh Amendment immunity. *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 645 (1911) (dictum) ("[N]either public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty."). PRASA, a public corporation completely responsible for its own finances, has a less colorable claim to being an arm of the State than did the Mt. Healthy school board,[14] which received a "significant amount of money from the State." *Mt. Healthy Bd. of Educ.*, 429 U.S. at 280. There is nothing in the Eleventh Amendment that is offended by denying immediate interlocutory appellate review in these circumstances.

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[14] The merits of Petitioner's claim of Eleventh Amendment immunity are not presented by the petition for certiorari. Respondent agrees with Petitioner and *amici* that any issues other than appealability must be remanded to the First Circuit for resolution. *See* Pet. Br. at 28; Br. of the Council of State Govt's, *et al.*, at 6 n.4.

### 4. The Eleventh Amendment Does Not Apply to Puerto Rico.

The Eleventh Amendment does not apply to Puerto Rico.[15] The Court has commented that the government established in Puerto Rico in 1900 probably comes within "the general rule exempting a government sovereign in its attributes from being sued without its consent," *Puerto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913), but it has not extended Eleventh Amendment protection to Puerto Rico. *Rosaly y Castillo* did not consider that issue.[16]

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15 The First Circuit Court of Appeals passed on this question, expressly ruling that Puerto Rico is entitled to Eleventh Amendment immunity, even though Respondent did not raise this issue in the courts below. Pet. App. A-2 n.1. In such a circumstance, particularly where the issue presents an important constitutional question, this Court may decide the matter. *See Virginia Bankshares v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991); *Stevens v. Dep't of Treasury*, 111 S. Ct. 1562 (1991). Puerto Rico's entitlement to Eleventh Amendment immunity is, after all, purely a question of law. It has been briefed by *amici*, *see* Br. of the Council of State Govt's, *et al.*, at 25-26, and is fairly subsumed in the questions presented in the petition for certiorari. It was, moreover, noted in the Brief in Opposition. Br. in Opp. at 14. Such an issue is subject to this Court's review. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905 (1991).

16 *Rosaly y Castillo* was decided without full briefing or argument, as the appellee made no appearance in this Court. The Court itself cast substantial doubt upon the validity of the dictum in *Rosaly y Castillo* in later cases. *E.g., Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914) ("In placing our decision upon the consent of Porto Rico to be made a party defendant under the circumstances presented by this case, we do not wish to imply that Porto Rico could not have been made a party without its consent . . . As to that we express no opinion.") (emphasis added); *see also Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916) ("Whatever might have been the merit of [appellant's claim of sovereign immunity] we hold . . . that having . . . appeared and taken the other steps above narrated, [appellant] could not thereafter deny the court's jurisdiction") (citations omitted) (emphasis added). The Court thereafter reflexively stated that Puerto Rico could not be sued without its consent, *e.g., Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 262 (1937), but the issue has never been fully examined by the Court.



By its terms, the Eleventh Amendment affords protection only to "one of the United States." U.S. Const. amend. XI. The Court has stringently applied that language. It has refused to extend the Amendment's protection to political subdivisions such as counties and municipalities or to multi-state agencies, even though such entities exercise a "slice of state power." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979); *Mt. Healthy Bd. of Educ.*, 429 U.S. at 280; *Luning*, 133 U.S. at 530. The straightforward application of this language leads to the conclusion that territories and possessions such as Puerto Rico are not States and do not enjoy Eleventh Amendment protection.

The distinction between States on the one hand, and territories and possessions on the other, permeates the Constitution. While States are free to enact legislation subject only to Constitutional constraints, United States territories and possessions are part of the federal government, subject to Congressional regulation and

control. Territories and possessions, particularly those acquired as spoils of war that were not intended to be incorporated into the union of States, did not have the choice of surrendering a piece of their sovereignty as a price of joining the union. Their sovereignty was unconditionally surrendered along with their territory, and they may exercise only those attributes of sovereignty that Congress expressly allows.

Congressional power over territories and possessions is plenary. The Constitution's Territorial Clause gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3. It has long been established that the Constitution does not operate in unincorporated territories or possessions by its own force, except for certain fundamental personal rights. *See Balzac v. Porto Rico*, 258 U.S. 298, 305, 312-13 (1922). An affirmative act of Congress is needed to apply specific constitutional provisions to these territories or possessions. *Id.* Thus, unless there is some explicit indication of Congressional intent to extend the Eleventh Amendment's protection to Puerto Rico, or to territories and possessions generally, there is no justification for importing additional meaning into the



limited language of the Amendment.[17] *See Lake Country Estates*, 440 U.S. at 401 (declining to extend Amendment to bi-state agency where there was no evidence of State or Congressional intent to do so).

There is no indication of Congressional intent to extend the Eleventh Amendment to Puerto Rico. Congress set forth specific constitutional provisions applicable to Puerto Rico, *see, e.g.*, Organic Act of 1917, 39 Stat. 951, 951-52 (1917) ("Jones Act"); Amendments to Organic Act, 61 Stat. 770, 770-71 (1947), in language virtually identical to that in the U.S. Constitution, but the Eleventh Amendment is not among them. Nothing in the Foraker Act enacted by Congress in 1900, Ch. 191, § 1, 31 Stat. 77 (1900), affords Eleventh Amendment protection to Puerto Rico.[18] Nothing in the Organic Act of 1917, 39

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[17] The lower federal courts, in considering claims of Eleventh Amendment immunity made by territories other than Puerto Rico, have always considered Congressional intent to be of paramount importance. After analyzing such intent, these courts have held that the Eleventh Amendment is not applicable to territories. *E.g., Saban v. Dep't of Finance of Northern Mariana Islands*, 856 F.2d 1317 (9th Cir. 1988); *Fleming v. Dep't of Public Safety*, 837 F.2d 401 (9th Cir. 1988) (Northern Mariana Islands); *Tonder v. M/V The Burkholder*, 630 F. Supp. 691 (D.V.I. 1986) (Virgin Islands); *Sakamoto v. Duty Free Shoppers Ltd.*, 613 F. Supp. 381 (D. Guam 1983) (Guam).

[18] The Foraker Act, if anything, suggests that Puerto Rico would be subject to suit regardless of the Eleventh Amendment. Section 7 established "a body politic under the name of The People of Porto Rico with governmental powers as hereinafter conferred and with power to sue and be sued as such." 31 Stat. at 79. Although *Rosaly y*

Stat. 951, does so. Nothing in the Puerto Rican Federal Relations Act, 48 U.S.C. § 731 *et seq.* (1950), does so. The Act applicable to territories generally does not even discuss the Eleventh Amendment. 48 U.S.C. §§ 1451-1492 (1982). This silence is significant because other constitutional provisions have explicitly been made applicable to various territories. *E.g.*, 48 U.S.C. § 1561 (1982) (various constitutional provisions applicable to Virgin Islands).

This Court has acknowledged that Congress may treat Puerto Rico differently from States. *Harris v. Rosario*, 446 U.S. 651, 652 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam); *see generally Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 674 (1945) (Congress is not subject to the same constitutional limitations when legislating for territories as when it is legislating for States). Although this Court has found some constitutional provisions applicable to Puerto Rico and

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*Castillo* interpreted this language to apply only where "consent [was] duly given," 227 U.S. at 277, the full implications of leaping from this statement to the conclusion that Puerto Rico is entitled to Eleventh Amendment immunity would be extraordinary. It would essentially strip federal courts of the power to exercise federal jurisdiction over entities that exist and are regulated solely at Congress' behest, without any indication that Congress intended such a significant curtailment of Article III power.



has declined to apply others to Puerto Rico,[19] the Court has never extended all Constitutional provisions to Puerto Rico, because of the "need to preserve Congress' ability to govern . . . possessions." *Torres*, 442 U.S. at 470. Where the Court has applied relevant constitutional provisions to cases arising in Puerto Rico, it has done so where personal rights were at stake or where there were indications of Congressional intent to extend such rights to residents of Puerto Rico. *See Torres*, 442 U.S. at 469-71.

These considerations are irrelevant to the applicability of the Eleventh Amendment. That Amendment, and the federalism concerns which gave it birth, simply do not speak to the relationship between the federal government and its own territories and possessions. The inherent affront to a State, argued to arise when it is sued in a federal court, does not exist here because Puerto Rico as a legal entity is a creature of the federal government.

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[19] *E.g.*, *Balzac*, 258 U.S. at 306 (Sixth Amendment's guarantee of grand and petit juries and Seventh Amendment's right to trial by jury do not apply); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Constitutional requirement that all taxes and duties imposed by Congress be uniform throughout the United States did not apply to Puerto Rico); *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (search and seizure provision of either the Fourth or the Fourteenth Amendment applies); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599-601 (1976) (Equal Protection Clause of either the Fifth or the Fourteenth Amendment applies); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974) (Due Process Clause of either the Fifth or the Fourteenth Amendment applies).

Territories and possessions, owned by the federal government, should necessarily be subject to suit in the federal courts, particularly when there is no statement of Congressional intent to the contrary.

The Eleventh Amendment, for these reasons, is not applicable to Puerto Rico. At a minimum, this Court should hold that no Congressional intent requires that an Eleventh Amendment claim made by a territory or possession be given the extraordinary interlocutory review sought here.



## CONCLUSION

The decision of the First Circuit is correct and should be affirmed.

Dated: June 8, 1992

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No. 91-1010

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

*Petitioner,*

v.

METCALF & EDDY, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## INTRODUCTION

Respondent has all but abandoned the First Circuit's holding that there is no right of immediate appeal from a district court's order denying a claim of Eleventh Amendment immunity from suit in federal court. Respondent's brief advances only one argument in support of the court of appeals' judgment. That argument, however, is inconsistent with the Eleventh Amendment and established doctrine. The bulk of Respondent's brief is an attempt to persuade this Court to reject Petitioner's claim of Eleventh Amendment immunity on its merits. The sole issue before this Court, however, is the jurisdictional question whether orders denying claims to such immunity are immediately appealable. Respondent's arguments against the merits of Petitioner's claim to immunity are not properly before this Court.

## ARGUMENT

### I.
### INTERLOCUTORY ORDERS DENYING CLAIMS TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT ARE IMMEDIATELY APPEALABLE

Our opening brief demonstrated that the sovereign immunity recognized by the Eleventh Amendment is an immunity from being subject to the jurisdiction of the federal district courts, not simply an immunity from the imposition of damages after a trial. Pet. Br. at 8-15, 17-20. Orders denying such immunity must be immediately appealable, because the right not to be sued would be lost irrevocably by delaying an appeal until the completion of trial court proceedings. *Id.* at 17-24. While acknowledging that an immediate appeal would be available *if* Eleventh Amendment immunity includes the right not to be sued, Respondent contends that the Eleventh Amendment lacks "an explicit guarantee against trial" and that the "core interest" of the Amendment only protects the States against monetary judgments. Resp. Br. at 12-18. Both contentions are erroneous.

Respondent's "explicit guarantee" argument contradicts the text of the Eleventh Amendment. Pet. Br. at 12-13. As we explained in our opening brief, the Amendment provides a rule of construction for the term "judicial power" in Article III of the Constitution. The Amendment provides that the federal judicial power "shall not be construed to extend to any suit . . . commenced or prosecuted" against a State by citizens of other States or foreign nations. The right guaranteed to the States by the Amendment is the right of governmental sovereigns not to be subject to judicial authority from the "commence[ment]" of suit through the "prosecut[ion]" of suit to trial and judgment.

Any narrower reading of the Eleventh Amendment would be inconsistent with the broad purpose of the



Amendment: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers,* 123 U.S. 443, 505 (1887). The Amendment recognizes a bar to district court authority not just to enter monetary judgments, but to conduct the entire range of pretrial and trial proceedings — particularly, as an historical and textual matter, in diversity suits like this one. See Pet. Br. at 9.[1]

Respondent's attempt to limit sovereign immunity to a "core interest" in avoiding monetary judgments similarly contradicts the text of the Eleventh Amendment, which contains no such limitation. This "core interest," which Respondent finds enunciated "forcefully" in decisions of this Court, Resp. Br. at 14, in fact contradicts decisions of this Court. This Court has made clear that a suit against a State or its departments is barred even where no monetary relief is sought. *Alabama v. Pugh,* 438 U.S. 781, 782 (1978) (per curiam). Indeed, this Court has expressly rejected an attempt to limit the immunity to monetary liability:

> It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to

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1. In addition to ignoring the language of and the policy animating the Eleventh Amendment, Respondent's "core interest" argument is mistaken for at least two reasons. First, Respondent is obviously wrong to assert that immediate appealability requires an explicit textual right not to stand trial. Resp. Br. at 12. As Respondent itself recognized, *id.* at 17, denials of official immunity are immediately appealable even though there is no textual right to such immunity. *See Nixon v. Fitzgerald,* 457 U.S. 731, 745 (1982). Second, with respect to the immunity at issue in this case, this Court has long recognized that the principle of sovereign immunity is reflected in, but is not limited by, the text of the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984); *Hans v. Louisiana,* 134 U.S. 1, 12 (1890). This principle of sovereign immunity protects against the "indignity" of the federal district courts' exercise of their power over sovereigns at the instance of private parties.

> enjoin the State itself simply because no money judgment is sought. . . . To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

*Cory v. White,* 457 U.S. 85, 90-91 (1982).

Respondent finally raises the specter of excessive burdens on the courts and delays in litigation if district court orders denying claims of sovereign immunity are held to be immediately appealable. Resp. Br. at 17. Respondent's vision of a flood of frivolous appeals is utterly implausible. There is no indication that frivolous appeals have clogged the dockets of any of the eight circuits that allow such appeals.[2] Moreover, the number of sovereign immunity appeals could not conceivably compare to the number of official immunity or double jeopardy appeals – both of which may be taken on an interlocutory basis. *Mitchell v. Forsyth,* 472 U.S. 511 (1985); *Abney v. United States,* 431 U.S. 651 (1977).[3] As this Court expressly noted in *Abney*, the lower courts have adequate means to weed out and deter frivolous, dilatory appeals, including the use of expedited procedures and sanctions. 431 U.S. at 662 n.8.

Respondent's unwarranted fears do not justify sacrificing the important right of State sovereign immunity – an essential element of the constitutional balance of

2. In addition to the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, *see* Pet. Br. at 19 n.17, the Eighth and Ninth Circuits have recently held that denials of sovereign immunity claims are immediately appealable. *See Barnes v. Missouri,* 960 F.2d 63 (8th Cir. 1992); *Durning v. Citibank, N.A.,* 950 F.2d 1419 (9th Cir. 1991).

3. Indeed, it is hard to imagine what large class of appeals Respondent has in mind. A sovereign immunity claim by a government entity like Petitioner typically will be litigated only once.



authority within the federal system. In short, no pragmatic reasons exist to deny States the means to vindicate their structural right not to be sued by private parties in federal court.

## II.
## RESPONDENT'S ARGUMENTS THAT FAIL TO ADDRESS THE QUESTION UPON WHICH CERTIORARI WAS GRANTED SHOULD BE REJECTED BY THIS COURT

Respondent makes three additional contentions in its brief: that Petitioner waived its claim of immunity, Resp. Br. at 18-21; that "public corporations" like Petitioner have no right to Eleventh Amendment immunity, *id.*; and that Puerto Rico is not entitled to sovereign immunity from suit, *id.* at 24-30. These three arguments should be rejected because they are not addressed to the question presented and because each lacks merit.

### A. Respondent's Three Arguments on the Merits Are Not Properly Before this Court

Respondent's three contentions are nothing but arguments against the merits of Petitioner's claim to sovereign immunity – a matter that the court of appeals did not review, that is not within the scope of the sole question presented in this Court, and that was not raised by any cross-petition.[4] These arguments, therefore, are not properly before this Court. As Respondent itself acknowledges, "any issues other than appealability must be remanded to the First Circuit for resolution." *Id.* at 23 n.14.

4. Respondent's argument with respect to public corporations is phrased as if it addresses the question of appealability, but the assertion that "public corporations" are not fully entitled to sovereign immunity challenges the merits of Petitioner's entitlement to immunity. The assertion is irrevelant to the question whether a district court's denial of *any entity's* claim to such immunity is immediately appealable.

Respondent cannot escape this problem by appealing to the principle that allows defense of a judgment below on alternative grounds. To advance arguments that are not part of the question presented in this Court, it is necessary (although not sufficient) that each argument support the judgment of the court below and neither add to nor modify it. *See, e.g., Thigpen v. Roberts,* 468 U.S. 27, 30 (1984); *Federal Energy Admin. v. Algonquin SNG, Inc.,* 426 U.S. 548, 560 n.11 (1976). If accepted, the arguments raised by Respondent would affirm the district court order rejecting Petitioner's individual claim of immunity. The judgment of the court of appeals, however, was a dismissal for lack of jurisdiction that did not address the merits of Petitioner's claim to immunity from suit. Pet. App. at A-8. Respondent's challenges to Petitioner's claim to Eleventh Amendment immunity are not arguments for the lack of immediate appellate jurisdiction to review such a claim.[5] Because these arguments support a judgment different from the court of appeals' judgment dismissing the appeal for lack of jurisdiction, they are not properly presented on review of the First Circuit's judgment.

5. *See Carroll v. United States,* 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case."); *Hagans v. Lavine,* 415 U.S. 528, 542 (1974) (distinguishing dismissal for lack of jurisdiction from dismissal because claim lacks merit); *Bell v. Hood,* 327 U.S. 678, 682 (1946).

As in *Hagans* and *Bell,* even if the claim is meritless, this case does not involve a claim that is "so insubstantial, implausible, foreclosed by prior decisions . . . or otherwise completely devoid of merit" as to defeat the basis of jurisdiction. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666-67 (1974), *quoted in Hagans,* 415 U.S. at 543. In fact, the district court, which rejected the claim of immunity, nevertheless denied Respondent's motion to impose sanctions against petitioner, stating the "sanctions should not be imposed for raising serious challenges" to the court's jurisdiction. Pet. App. at A-9.



**B. Each of Respondent's Three Arguments Is Meritless**

In any event, Respondent's three arguments on the merits are an insufficient basis for this Court to do anything but reverse and remand the case for consideration of the Petitioner's Eleventh Amendment claim on the merits. Without fully briefing these arguments, we address each in turn.

Respondent's waiver argument is meritless. If, as this Court has held, a claim of Eleventh Amendment immunity is not waived by failure to raise it in the trial court at all, *Edelman v. Jordan,* 415 U.S. 651, 678 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 466-67 (1945), neither can such a claim be waived by "moving to dismiss for failure to join an indispensable party *before* moving to dismiss on Eleventh Amendment grounds." Resp. Br. at 19 (footnote omitted). Moreover, Respondent has not argued previously that Petitioner waived its Eleventh Amendment claim. To the contrary, in opposing certiorari, Respondent conceded that "[Petitioner] has not waived whatever Eleventh Amendment defense it may have." Opp. Br. at 12 (footnote omitted). *See also* Br. of Appellee in Support of Motion to Dismiss Appeal at 14, 17 ("[T]here can be no suggestion . . . that [Petitioner] does not wish to pursue this defense or that it has knowingly and voluntarily waived it.").

Similarly, Respondent failed to raise in the courts below the argument that public corporations do not share States' sovereign immunity from suit. In the court of appeals, Respondent nowhere argued for a blanket rule holding that "public corporations" cannot be "arms of the State" for purposes of sovereign immunity from suit. Instead, Respondent advanced a case-specific argument that Petitioner was not entitled to the immunity because of certain of its individual characteristics, not because of Petitioner's general status as a public corporation. Br. of Appellee at 17; Opp. to PRASA's Motion for Reconsideration (Mar. 15, 1991) at 4-5. Respondent's

approach in the court of appeals surely is correct: no reason exists why sovereign immunity should be unavailable to a public corporation simply because of its form of organization. Mere forms and labels – particularly where their meaning and significance is derived from a legal tradition as unique as Puerto Rico's – cannot control whether a governmental entity is an arm of the State. Case-by-case inquiry is needed to resolve the question, as the First Circuit itself has recognized in affording Eleventh Amendment immunity to other Puerto Rican public corporations on an individual basis. *See* Pet. Br. at 2-3.[6]

Finally, Respondent's claim that Puerto Rico is not entitled to sovereign immunity from suit was not raised in the court of appeals. That is hardly surprising because the question has long been settled in the First Circuit, as the court below recognized. *See* Pet. App. at A-3 n.1. This Court, too, has repeatedly recognized that Puerto Rico enjoys the sovereign immunity from suit enjoyed by the States of the Union. *See, e.g., Sancho v. Yabucoa Sugar Co.,* 306 U.S. 505, 506 (1939) ("[T]his suit cannot be maintained unless authorized by Porto Rican law, because Porto Rico cannot be sued without its consent."); *Puerto Rico v. Shell Co.,* 302 U.S. 253, 262 (1937) (statute conferred "upon the territory many of the attributes of quasi sovereignty possessed by the states – as, for example, immunity from suit without their consent."); *Porto Rico v. Rosaly y Castillo,* 227 U.S. 270, 273 (1913) (absent exception, "Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being

6. This Court has addressed the merits of Eleventh Amendment immunity claims made by public corporations without suggesting that the claimant's identity as a public corporation automatically precluded such a claim. *See, e.g., Port Auth. Trans-Hudson Corp. v. Feeney,* 495 U.S. 299 (1990); *Petty v. Tennessee-Missouri Bridge Comm.,* 359 U.S. 275 (1959).



sued without its consent.").[7] The conclusion that Puerto Rico enjoys sovereign immunity from suit is in no way undermined by the Eleventh Amendment's reference to "one of the United States." This Court has long recognized that the Congress intended "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 594 (1976) (quoting *Calero-Toledo,* 416 U.S. at 671). And this Court has also long recognized that the principle of state sovereign immunity is broader than – is reflected in, but not limited by – the Eleventh Amendment. *Pennhurst,* 465 U.S. at 98; *Hans,* 134 U.S. at 10. That inherent constitutional principle fully applies to Puerto Rico as a sovereign entity.[8]

7. *See also Posadas de P.R. Assoc. v. Tourism Co.,* 478 U.S. 328, 339 (1986); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 673 (1974) (because Puerto Rico is "sovereign over matters not ruled by the Constitution," it is "State" for purposes of 28 U.S.C. § 2281 (1970)) (citation omitted).

8. It would be particularly inappropriate for this Court to revisit this question in a case where the Attorney General of Puerto Rico has not appeared. The Attorney General's absence reflects nothing more than the fact, hardly unique to Petitioner, that statutory authority exists for private counsel to represent this arm of the Commonwealth.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for consideration of the sovereign immunity question on its merits.

Respectfully submitted,

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether an order of a federal district court denying a claim of state sovereign immunity is a collateral final order from which an interlocutory appeal may be taken.

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE AMICI CURIAE

*Amici*, organizations whose members include state, county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case features an issue of paramount concern to *amici*: the constitutional principle of state sovereign immunity and the willingness of federal courts to guard effectively against encroachments on that immunity.

Equating the Commonwealth of Puerto Rico's immunity to that of a State, the First Circuit addressed the issue of appellate jurisdiction presented by this case as if it involved a claim by a State. It then proceeded to mischaracterize the interest represented by state sovereign immunity as merely a protection of the States' treasuries from damages awards. That myopic approach to state sovereign immunity misconceives and denigrates the role of state sovereignty within our federal system. Sovereign immunity, as the term implies, is based upon recognition of the States' continued sovereignty within the Union and the immunity from suit that a sovereign customarily enjoys.

District courts will, upon occasion, err in construing claims of sovereign immunity, resulting in the wrongful denial of such claims. If denied a right of immediate appeal in those circumstances, States—which as a matter of constitutional principle cannot be haled unwillingly before the federal courts—will nonetheless be compelled to submit to pretrial procedures and ultimately stand trial in those courts.

For the reasons set forth more fully below, that result is neither compelled nor permitted by 28 U.S.C. § 1291 (1976), the statute governing appeals from district court orders. The straightforward application of established principles under that statute requires the federal courts of appeals to allow a State to vindicate its sovereign interest in avoiding trial at the outset, without having first to stand trial in order to do so. For this reason, *amici* submit this brief to assist the Court in its resolution of the case.[1]

## STATEMENT

Petitioner, the Puerto Rico Aqueduct and Sewer Authority ("the Authority") is a Puerto Rico public corporation and "an autonomous government instrumentality

[1] The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.



of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 22 § 142. The Authority provides drinking water and wastewater treatment throughout Puerto Rico, a task designated by statute as "an essential government function." *Id.* This action arises from a contract that the Authority entered into with a private engineering firm, Metcalf & Eddy, Inc., for work on various Authority facilities.

Following an audit of Metcalf & Eddy invoices, and the withholding of certain payments by the Authority, Metcalf & Eddy filed suit in the United States District Court for the District of Puerto Rico, citing diversity of citizenship as the basis for jurisdiction. The suit claimed breach of contract and damage to business reputation. The Authority ultimately moved to dismiss, citing "its immunity from suit under the Eleventh Amendment to the United States Constitution."[2] The district court denied the motion, holding that "defendant is not entitled to Eleventh Amendment immunity in this case because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds." Cert. App. A9.

The Authority filed a timely notice of appeal. On September 25, 1991, the First Circuit entered an order dismissing the appeal for want of appellate jurisdiction (*Metcalf & Eddy v. Puerto Rico Aqueduct & Sewer Authority*, 945 F.2d 10 (1st Cir. 1991)), taxing costs of the appeal against the Authority. The court found that dismissal of the appeal was compelled by its prior ruling in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), which held that a State's claim of Eleventh Amendment immunity was not a claim of an "entitlement not to stand trial" and thus was not appealable as a "collateral order" under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S.

[2] This characterization of the motion as raising a defense of "immunity from suit under the Eleventh Amendment" is the Authority's own, taken from the Authority's Petition for Writ of Certiorari at 5. As described below, *amici* believe that the defense being asserted is properly termed "sovereign immunity".

541 (1949). In deciding this issue, the First Circuit panel did not reach the merits of the Authority's immunity claim. 945 F.2d at 14 n.6.

## SUMMARY OF ARGUMENT

In a series of decisions beginning with *Abney v. United States*, 431 U.S. 651 (1977), this Court has recognized a defendant's right to take an immediate appeal from an order denying a defense that is properly understood as a "right not to stand trial." The Court has reasoned that denial of such a right is a "final decision" within the meaning of 28 U.S.C. § 1291 because the right at stake would be rendered ineffectual if the party asserting it had to wait until *after* trial to appeal an erroneous determination. The Court has applied this "collateral order" doctrine to claims of absolute and qualified immunity, both of which protect the party claiming the immunity from appearing in court at all to answer to the damages suit of a private party. Sovereign immunity has likewise long been understood to reflect a sovereign's prerogative not to be haled into court against its will.

To be immediately appealable under 28 U.S.C. § 1291, an order that does not finally resolve a claim must (1) conclusively determine the disputed question; (2) resolve an important issue distinct from the merits; and (3) be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In this case, the court of appeals held that the claim of "Eleventh Amendment immunity" asserted by the Authority failed the third part of this three-part test. In that court's view, state sovereign immunity merely limits the federal court's subject matter jurisdiction in order to protect state treasuries from damages awards—a protection that could be afforded just as effectively after trial as before.

The court of appeals made two basic errors in its approach to state sovereign immunity.[3] *First*, the court

[3] The court equated the claim of the Commonwealth of Puerto Rico to an "Eleventh Amendment" claim asserted by a State, and pursued its analysis as if the Commonwealth were a State. The analysis in this brief is based on the same assumption.



mistakenly focused on the specific jurisdictional limitation described in the Eleventh Amendment, and ignored the broader principle of state sovereign immunity which the Amendment helps to implement. That immunity predated the Constitution and survived its ratification; it was not created by limiting the jurisdiction of the federal courts. Sovereign immunity, as its name implies, is an attribute of the sovereign and an immunity from suit. It is no less an immunity than the qualified or absolute immunity possessed by certain government officials. It is, therefore, more than a matter of Eleventh Amendment "jurisdiction" and merits the same protection afforded qualified and absolute governmental immunity under the Court's "collateral order" case law.

*Second*, the court of appeals mistakenly viewed the States' conceded surrender of some *portion* of their sovereignty in forming the Union as a wholesale surrender of sovereignty and sovereign immunity. Although the elements of sovereignty which the States surrendered were important, the surrender of certain sovereign prerogatives did not change the character of what the States retained. Thus, the sovereign immunity that was retained remains an immunity from certain kinds of suits—an immunity of the kind that gives rise to a right of immediate appeal when denied by a district court.

In sum, a district court's denial of a constitutional claim of sovereign immunity, on grounds determinable apart from the merits of the action, is immediately appealable as an order "which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudi-

cated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546.[4]

## ARGUMENT

### I. AN ORDER DENYING A CLAIM OF SOVEREIGN IMMUNITY FALLS WITHIN THE COLLATERAL ORDER DOCTRINE

Our federal structure is that of a Union of States that continue to enjoy, subject to the terms of the constitutional compact they created, a substantial measure of their historic sovereignty. *See Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399-2400 (1991). Thus, within the federal system, claims of state sovereign immunity are of signal importance, for they reflect basic understandings of the respective roles of federal and state governments. States are not ordinary litigants. When a substantial claim of state sovereign immunity is presented, respect for the States' sovereignty and for our constitutional scheme require that a district court address the claim at the outset, and, when necessary, have it determined conclusively before the case proceeds further. As shown below, the courts of appeals have been granted the statutory jurisdiction necessary to allow this to happen.

The jurisdiction of the courts of appeals over decisions of the district courts is governed by 28 U.S.C. § 1291, which provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291. "Final decisions" are generally to be equated with final judgments that end the litigation on

[4] This case asks the Court to decide only that the denial of a claim of sovereign immunity is appealable as a collateral order. It does not require the Court to address questions, not decided by the court below, concerning the *bona fides* of petitioner's claim of immunity and the completeness of the record needed to address the sovereign immunity claim in this case. Those issues should be remanded to the First Circuit for resolution.



the merits. *Catlin v. United States*, 324 U.S. 229, 233 (1945). Nonetheless, the Court has found immediately appealable a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546. To fall within this "small class," an order must meet a three-part test. It "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468; *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[5]

Applying this test, the Court has held that denial of a Fifth Amendment claim of double jeopardy is immediately appealable. The Court has emphasized that one of the rights encompassed by that claim—a right not to stand trial a second time—would effectively be nullified if a defendant were compelled to stand trial before he might vindicate his right. *Abney*, 431 U.S. at 660. Following *Abney*, the Court held that an order denying a claim of absolute immunity asserted by the President (*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)), or based on the Speech and Debate Clause (*Helstoski v. Meanor*, 442 U.S. 500 (1979)), is immediately appealable as well. Most recently, the Court held that denial of a claim of qualified immunity, presented by motion for summary judgment and turning on an issue of law, is an appealable decision

[5] The "collateral order doctrine" has generally been applied to district court orders entirely distinct from the main claims and defenses which form the core of the lawsuit. *E.g., Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (order relating to security); *Stack v. Boyle*, 342 U.S. 1 (1951) (excessive bail); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (certain orders assigning the costs of notice in class action); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (order vacating attachment); *Roberts v. United States District Court*, 339 U.S. 844 (1950) (order denying *in forma pauperis* status).

within the meaning of 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511.

As shown below, the district court order rejecting defendant's claim of sovereign immunity in this case falls squarely within the reach and reasoning of these decisions. Thus, petitioner's appeal should have been allowed.

### A. Because A Claim Of Sovereign Immunity Is Based On The Sovereign's Entitlement Not To Be Haled Before A Court Against Its Will, The Denial Of Such A Claim Is Effectively Unreviewable After Trial

The last element of this Court's three-part test, and the one which formed the basis of the First Circuit's refusal to entertain petitioner's appeal, holds that the order in question must be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. In the sense most pertinent to the issue here, this means that the order must be one that "unless it can be reviewed before the proceedings terminate, it can never be reviewed at all." *Mitchell*, 472 U.S. at 525. An immediate appeal may be allowed under the *Cohen* collateral order doctrine where "the order at issue involves 'an asserted right *the legal and practical value of which would be destroyed* if it were not vindicated before trial.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (emphasis added) (*quoting United States v. MacDonald*, 435 U.S. 850, 860 (1978)).

Each of the Court's cases upholding the right of appeal in such circumstances—*Abney*, *Nixon*, *Helstoski*, and *Mitchell*—turn on the Court's recognition that the defense being asserted was, in a meaningful sense, an entitlement not to be called before the court at all, that is, a right not to stand trial. Because such a right by its nature cannot "be effectively vindicated after the trial has occurred," *Mitchell*, 472 U.S. at 525, the Court found that the orders at issue involved rights "the legal and practical value of which" would be eviscerated unless an immediate appeal were allowed. "[T]he critical question, following *Mitchell*, is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988).



As the court below acknowledged, every other court of appeals to consider the question has had little difficulty recognizing that a claim of sovereign immunity falls comfortably within the reach of the *Abney* doctrine. Indeed, those courts have in the main taken that proposition as self-evident, recognizing that it is implicit in the very concept of "sovereign immunity."[6] As the Second Circuit concluded in *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), in "the case of an absolute immunity such as that provided by the eleventh amendment, the essence of the immunity is the possessor's right not to be haled into court—a right that cannot be vindicated after trial."[7]

The court below reached a different conclusion, considering itself bound by the First Circuit's prior decision in

[6] *Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir. 1989); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Corporate Risk Management Corp. v. Solomon*, 1991 U.S. LEXIS 15001 (6th Cir., July 2, 1991) ("The essence of an Eleventh Amendment claim is a right not to stand trial"); *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir. 1991); *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

[7] The use of the term "immunity"—as in "sovereign immunity," "qualified immunity" or "absolute immunity"—connotes the kind of protection from suit with which the *Abney* line of cases is concerned.

To be sure, merely calling a defense an "immunity" does not necessarily mean that it confers absolute protection from trial. Indeed, as this Court's careful analysis of the immunity at stake in *Mitchell* confirms, the First Circuit was correct in declining to afford "the word 'immunity' [a] talismanic significance," under which "the mere incantation of the term, without reference to the nature and type of immunity involved," would confer a right to an immediate appeal. 945 F.2d at 13-14. The First Circuit erred, however, in declining to afford any significance to the understanding of the right being claimed as an immunity and, more particularly, in misconstruing the historic understanding of the term "sovereign immunity."

*Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987). In *Libby*, the court rejected the common wisdom that sovereign immunity is an immunity from suit, finding it "more akin to a bar for lack of federal subject matter jurisdiction." 833 F.2d at 406. The court went on to hold that "even assuming the [Eleventh Amendment] is properly characterized as an 'immunity' or even as an 'absolute immunity,'" the rationale of *Abney* and its progeny was inapplicable as the State suffered no special injury "because of the indignity" of being haled into court. *Id.* at 406. Reasoning that because a State may be subjected to suit for injunctive relief in a federal court under *Ex parte Young*, 209 U.S. 123 (1908), the First Circuit held that the State's sole interest under the Eleventh Amendment lay in the protection of its treasury from damages, not in avoidance of trial. Following *Libby*, the court below held that because a State's interest in avoiding the payment of damages "can be adequately vindicated upon an appeal from a final judgment," an order denying a claim of Eleventh Amendment immunity is not an appealable collateral order.

As shown below, the First Circuit (1) misconceived the nature of "Eleventh Amendment immunity" by deeming it merely jurisdictional, and (2) misunderstood the implications of the States' surrender of a portion—but not all—of their historic immunity when they entered into the Union.

### 1. *An Eleventh Amendment Defense Invokes Sovereign Immunity, Which Encompasses Not Merely A Limitation On District Court Jurisdiction, But Also A Sovereign's Right Not to Stand Trial*

The Eleventh Amendment is phrased in jurisdictional terms, as a limitation on the judicial power of the United States.[8] Its formulation parallels the jurisdictional grants

[8] Although members of the Court have disagreed on the scope of the Eleventh Amendment, there appears to be agreement that it reaches respondent's cause of action: a non-federal claim brought by an individual under diversity jurisdiction. *See, e.g., Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 310 (1990) (Brennan, J., concurring in part) ("[T]he Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity.").



to the federal courts found in Article III of the Constitution. But the First Circuit erred in characterizing the Authority's "Eleventh Amendment defense" as *simply* a jurisdictional defense, without regard to the rule of sovereign immunity which preceded and motivated it.[9]

What is frequently—and confusingly—referred to as an "Eleventh Amendment defense" or "Eleventh Amendment immunity" is not based upon the jurisdictional restriction set forth in the language of that Amendment. This Court's "Eleventh Amendment" jurisprudence focuses not on the Amendment's language or its immediate purpose, but on the broader, underlying principle of state sovereign immunity which it helped to reaffirm. As this Court recently explained, the Eleventh Amendment is invoked "not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system *with their sovereignty intact.*" *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991) (emphasis added).[10]

[9] In supporting its characterization of "Eleventh Amendment immunity" as jurisdictional, the First Circuit relied on an historical analysis by Professor Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1473-84 (1987). *See Libby*, 833 F.2d at 406. That analysis has been rejected by the Court as inconsistent with long-standing precedent about the meaning of state sovereign immunity. *See Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487-88 (1987).

[10] Because of the widespread confusion about terminology, a claim of sovereign immunity is fairly raised by invoking the "Eleventh Amendment".

The difficulty with terminology is highlighted where the claim is asserted by the Commonwealth of Puerto Rico. For example, the court below said that "Puerto Rico is to be treated as a state for

As this Court has many times recalled, the Eleventh Amendment was intended to overcome *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III of the Constitution, by extending the judicial power to certain suits involving the States, was perforce an abrogation of state sovereign immunity. *E.g., Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring). The Amendment overturned this Court's ruling and thus restored the States' preexisting immunity in the only situation in which the grant of judicial authority to the U.S. courts had seemed by its terms to take it away—Article III's grant of subject matter jurisdiction to the federal courts in cases involving States.

The Court has frequently had occasion to recognize, however, that the Eleventh Amendment's focused jurisdictional language, suited to its immediate purpose, should not be allowed to obscure a more important underlying principle: that the States were sovereign when they joined the Union. As sovereigns they possessed and,

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Eleventh Amendment purposes." 945 F.2d at 11 n.1. *See also Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Authority*, 744 F.2d 880, 886 (1st Cir. 1984) ("Eleventh Amendment, which deprives the federal courts of power to hear claims for damages against any of the United States, has been held to apply to Puerto Rico").

It would ordinarily be apparent that a provision of the Constitution that by its terms applies to the States, and which reflects a compact between and among the States, does not apply, in terms, to the Commonwealth of Puerto Rico (although Congress might expressly declare it applicable).

On the other hand, it is entirely appropriate to conclude, as this Court has held, that just as the States retained some measure of sovereign immunity in joining the Union, the United States has decided to respect some degree of sovereign immunity with respect to the Commonwealth of Puerto Rico. *See Porto Rico v. Rosaly*, 227 U.S. 270 (1913). *See also Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 593-94 (1976) ("the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union"); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671-73 (1974).



within the constitutional structure, they continue to possess, an immunity from suit, except insofar as surrender of that immunity was a necessary corollary to their participation in the Union. Thus, wholly apart from "the letter of the Eleventh Amendment," it remains a "postulate" of the federal system that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'"[11] *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting *The Federalist* No. 81, at 487 (C. Rossiter ed. 1961) (A. Hamilton)). *See also Blatchford*, 111 S.Ct. at 2581.

To be sure, an immunity from suit possessed by a defendant ordinarily implies a correlative limitation on judicial power. It is thus fair to refer to an "Eleventh Amendment defense" as "jurisdictional" in the obvious sense that, as a result of the defense, the federal courts lack the power to entertain the case. *E.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 & 99 n.8 (1984) ("a constitutional limitation on the federal judicial power" which "deprives federal courts of any jurisdiction"); *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921) ("the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State").[12] It

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[11] The most significant aspect of sovereignty surrendered by the States was in the form of powers granted to the federal government and the recognition that the Constitution and laws of the United States would, under the Supremacy Clause, override state law. Flowing from that surrender of substantive legislative power, there was a surrender of sovereignty to the extent that States might be subjected to suit to enforce "supreme" federal law (*see Ex parte Young*, 209 U.S. 123 (1908)), particularly where Congress declares such suit necessary to sustain some federal power under the Necessary and Proper Clause. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Hoffman v. Connecticut*, 492 U.S. 95, 111 (1989); *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

[12] The tendency to refer to the sovereign immunity of the States as jurisdictional is compounded by the jurisdictional character of

is perfectly appropriate to treat sovereign immunity in this way, especially where doing so invests it with the procedural preeminence associated with jurisdictional defenses, *e.g.*, that the defense may not be inadvertently waived and ought to be addressed as a matter of first priority as this Court has generally done. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) ("Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945).

But the Court has never lost sight of the fact that state sovereign immunity was not born as a limitation on the grant of power to the federal courts, but rather had its genesis in antecedent notions of sovereignty. State sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *See Union Gas*, 491 U.S. at 32 (Scalia, J., concurring in part and dissenting in part). The States brought their sovereignty with them to the Union they formed; it was not granted to them by the Constitution. Moreover, sovereign immunity, as the term implies, is an attribute of that sovereignty; it was not fashioned by limiting the jurisdiction of the federal courts. Therefore, the fact that sovereign immunity may, for some purposes, be described as "jurisdictional" undermines neither its deeper historical roots nor its broader meaning.[13]

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the Eleventh Amendment itself, and by the pre-ratification debate over the effect of the grant of jurisdiction to the federal courts under Article III on the immunity of the States.

[13] Simply because the immunity "partakes of the nature of a jurisdictional bar," and therefore might, in some circumstances, be raised for the first time on appeal, *see Edelman*, 415 U.S. at 678, does not require that it be considered a mere jurisdictional defense for all purposes. Indeed, if sovereign immunity were a true limitation on the constitutional subject matter jurisdiction of the federal courts, the States presumably could not waive it. *See Employees*, 411 U.S. at 294 n.10 (Marshall, J., concurring in the result) (describing the permitted waiver of a jurisdictional limitation as "anomalous").



The "essence" of a claimed right (*Van Cauwenberghe*, 486 U.S. at 524) is to be found in the way that the right is commonly understood.[14] Just as this Court's cases make it clear that sovereign immunity is something more than the "merely" jurisdictional limitation on the power of the federal courts set forth in the Eleventh Amendment, those cases likewise reflect the understanding that under the American system of jurisprudence, sovereign immunity is primarily regarded as a right, possessed by the sovereign, not to be haled before a court at all—a right not to be sued or compelled to stand trial.[15]

Thus, the Court has referred to sovereign immunity as "an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). It has been described as arising from the problems "inherent in making one sovereign appear against its will in the courts of the other." *Employees*, 411 U.S. at 294 (Marshall, J., concurring in the result). The Court's formulation echoes that of the Framers. James Madison expressed the principle of sovereign immunity in these terms: "It is not in the power of individuals *to call any state into court.*" 3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed. 1836) [hereinafter cited as *Elliot's Debates*]. Similarly, Alexander Hamilton put it this way: "It is inherent in the nature of sovereignty not

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[14] This is not simply a matter of "characterization" (*see Mitchell v. Forsyth*, 472 U.S. at 551 (Brennan, J., concurring)), but rather of the accepted understanding of the nature of the right.

[15] *Amici* are aware of the suggestion of various commentators that sovereign immunity is largely a modern creation and did not exist at old common law. But that academic theory only serves to emphasize the importance of the judicial understanding of state sovereign immunity. In the face of what the American courts have long understood the right of sovereign immunity to entail, a historical analysis which suggests that sovereign immunity *should have been* understood to mean something else counts for little.

to be amenable to the suit of an individual without its consent." *The Federalist* No. 81, at 487 (C. Rossiter ed. 1961).[16] At the beginning of the century, the Court described the doctrine of sovereign immunity as ensuring that "[w]ithout [a State's] consent it *cannot be sued* in any court, by any person, for any cause of action whatever." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 641 (1911) (emphasis added). And specifically with respect to Puerto Rico, the Court has described sovereign immunity as a "general rule exempting a government sovereign . . . from *being sued* without its consent." *Porto Rico v. Rosaly*, 227 U.S. at 273 (emphasis added). What all of these formulations have in common is the notion that sovereign immunity is at its heart an immunity from suit.[17]

[16] Those schooled in the doctrine of sovereign immunity found it difficult to conceive of a State appearing in court as some ordinary litigant. This puzzlement is exemplified by the statement of George Mason, speaking at the Virginia convention, who protested:

> Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject further. What is to be done if a judgment be obtained against a state? Will you issue a *fieri facias*? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.

3 *Elliot's Debates* 527.

[17] The States' sovereign immunity from suit in federal court is merely an extension of their more general immunity from suit in any forum. Therefore, sovereign immunity is, at bottom, a matter of the State's prerogative not to be sued at all. It is accordingly not merely a right not to be sued in a particular forum. *Cf. Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 501 (1989) (denial of motion to dismiss based on contractual forum selection clause is not immediately appealable). The fact that a State may *voluntarily* elect to allow the suit to be prosecuted in its own courts does not change the fact that a claim of sovereign immunity is, in essence, a claim of entitlement not to be sued anywhere. *But cf. Nevada v. Hall*, 440 U.S. 410, 421 (1979) (Constitution does not require that courts of one sovereign State respect immunity of sister State).



In sum, it is more accurate to say that the federal courts lack the power to treat the States as ordinary litigants because the States retained a preexisting sovereign immunity than it is to say that state immunity is a function of the limited jurisdiction granted the federal courts. Sovereign immunity is not an attribute of a particular court system, but rather an attribute of a governmental defendant, the "essence" of which is a right not to be sued. To the extent the Court has sometimes described sovereign immunity as a limit on federal court jurisdiction, that should not obscure its "essence" as an immunity from trial, for the Court has described it as jurisdictional only to elevate it, not to diminish it.

### 2. *The States' Partial Surrender Of Immunity Does Not Change The Nature Of The Immunity That Is Retained*

The First Circuit in *Libby* concluded that the general understanding that state sovereign immunity is an immunity from trial overlooks "the reality of the *Ex parte Young* exception to the Eleventh Amendment." The First Circuit observed that a State can effectively be compelled to stand trial when suit is brought under federal law for injunctive relief against a state official acting in his official capacity.[18] In light of that principle—the principle of *Ex parte Young*—the court of appeals felt that it "cannot be convincingly argued that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial." 833 F.2d at 406. Instead, "the damage the Eleventh Amendment seeks to forestall is that of the State's fisc being subjected to a judgment for compensatory relief." *Id.* This view of the Eleventh Amendment as primarily a protection of the State's treasury from damages awards

[18] Although the premise of *Ex parte Young* is that the suit is not in fact brought against the State but rather against an officer, in practical effect it is a suit against the State. *But cf. Cory v. White*, 457 U.S. 85, 90-91 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.").

misconceives the origins of the sovereign immunity doctrine and the nature of the *Ex parte Young* exception.[19]

The *Ex parte Young* principle is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). *See Pennhurst*, 465 U.S. at 102 (*Ex parte Young* allows federal courts to hold the States accountable to "supreme authority of the United States"); *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."). It rests on premises very similar to the premises that support the various other circumstances in which a State may be called upon to defend an action in federal court, *e.g.*, when it is sued by another State or by the United States,[20] or when

[19] We have no doubt that a State also has an interest in avoidance of damages and that the State's sovereign immunity guards that interest as well as the State's interest in avoiding trial. But the existence of such a dual interest is obviously not dispositive under the collateral order doctrine. For example, a defendant with a meritorious double jeopardy defense has an entitlement not to be punished twice for the same offense and an entitlement not to be placed twice in jeopardy. A post-trial appeal may effectively protect the defendant from being twice punished, but it is unavailing in preventing him from being placed twice in jeopardy.

[20] The Court has reasoned that the United States may sue States in federal court because, absent this authority, the "permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329 (quoting *United States v. Texas*, 143 U.S. 621, 645 (1892)). Likewise, States may sue other States in a federal forum because "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States . . . was essential to the peace of the Union." *Id.* at 328.

The former limitation on state sovereign immunity reflects the supremacy of the United States under the federal system and its obligation to preserve the stability of the Union. The latter confirms the coequal status of the sister States and the need for a forum to resolve disputes among charter members of the Nation.



Congress, by "unmistakably clear" statutory language, has declared its intention to abrogate state immunity in order to implement supreme federal law.[21]

What each of these limitations on sovereign immunity has in common is that the surrender of the State's sovereign immunity may fairly be inferred—just as the State's retention of sovereign immunity may be inferred—from "the plan of the convention."[22] *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581. *See also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. at 487 (plurality opinion). This Court has never found the surrender of sovereignty to be broader

[21] Congress may create a cause of action against a State and provide for its presumptive enforcement in state courts or, when necessary and proper, in the federal courts. *See Union Gas*, 491 U.S. at 14-24.

The States expressly granted a superseding legislative authority only to Congress. Because abrogation of sovereign immunity may "upset[] the fundamental constitutional balance between the Federal Government and the States," *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985)), it is appropriate that the Court guard against judicial or executive overreaching by insisting that such abrogation be found only when *Congress* itself has made its intention "unmistakably clear" in the text of the statute. *Atascadero*, 473 U.S. at 242. *See also Welch*, 483 U.S. at 474 (plurality opinion).

[22] The understanding that the immunity of the States would be abrogated in part is also reflected in the statements of the Framers. State sovereign immunity, unlike the immunity of kings, was subject to the will of the people working through the democratic process:

> [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.

*The Federalist* No. 45, at 289 (J. Madison). The balance that this Court has struck in describing the continued existence of state sovereignty, except as necessary to reflect the plan of the convention, reflects this fundamental, democratic principle. Indeed, even the recognition that state sovereign immunity may be overridden by the people of the State (through a State's waiver of its sovereign immunity), or by Congress under the "unmistakable intention" rule, reflects this basic sense of the constitutional plan.

than that compelled by the language of the Constitution—notably the Supremacy Clause and the broad grant of legislative authority to Congress—and the necessities of a peaceful and well-functioning Union. More to the present point, recognition that the States necessarily surrendered some portion of their sovereign immunity in joining the Union does not change the character of what they retained. As explained above, part of what they retained has always been understood as an immunity *from suit.*

In applying the "collateral order" doctrine, this Court has never suggested that the immunity being asserted by the defendant must apply to save the defendant from litigation in all cases, at all times. In *Mitchell*, this Court took pains to describe the qualified immunity as "an entitlement not to stand trial *under certain circumstances.*" 472 U.S. at 525. The qualified immunity at issue in *Mitchell*, and the absolute immunity found in *Nixon*, were both described as immunities from being asked to answer a claim of *damages*, as here. In a proper circumstance, there was little question that a suit might be brought against the same defendant for injunctive relief. Where the qualified immunity defense was not proven, even the very same defendant in *Mitchell* could have been held answerable in damages. Thus, those cases do not support the distinction drawn by the First Circuit in *Libby* based on the "reality" that under *Ex parte Young* a State might be subjected to suit in federal court on a federal claim for injunctive relief. It is sufficient answer to say that the States' immunity, to the extent retained, continues to reflect the principle that a State ought not to be haled into court against its will.

### B. A Claim Of Sovereign Immunity Easily Satisfies The Remaining Requirements Of The Collateral Order Doctrine

There is little question that the Authority's claim of sovereign immunity satisfies the two additional criteria required for a district court decision to be deemed an appealable collateral order.



*First*, the decision must be one that conclusively determines the disputed question. *Mitchell*, 472 U.S. at 527. The denial of the Authority's motion easily meets this test. The issue was addressed and resolved as a question of law. The district court did not suggest that any further fact-finding was required or would be entertained on the issue.[23] Thus, the court conclusively rejected the claim of sovereign immunity on the merits.

*Second*, the question must be "an important issue completely separate from the merits." *Coopers & Lybrand*, 437 U.S. at 468. These requirements are also easily satisfied here.[24] Under the *Abney* line of cases, the Court has acknowledged that to determine separateness it will, at a minimum, be necessary to examine the allegations and the underlying facts in order to resolve the issues presented by defendant's claim—whether in connection with a double jeopardy claim or a claim of immunity. *See Mitchell*, 472 U.S. at 528-29. It is sufficient, however, that the issue raised by the defendant's claim is "conceptually distinct" from the merits, *id.* at 527-28, so that there is no need to "consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Id.* To the extent that a given claim of sovereign immunity might, on occasion, compel the court to peek at the merits—to determine, for example, who were the contracting parties, or the scope of an express waiver that was limited to certain causes of action—that exercise would be similar to the kind con-

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[23] Respondent's theory in its opposition to the petition—that the court of appeals lacked jurisdiction over the appeal because there were factual issues to be determined—is without merit. The district court issued a conclusive ruling, purporting to resolve the issue as a matter of law. It indicated no need for further fact-finding. Thus, the court of appeals had jurisdiction over the district court's order. The court of appeals may of course ultimately find a need for further factual determinations, but that would not affect the appealability of the underlying order.

[24] The requirement that the issue be "important" is discussed in the next section.

ducted in resolving double jeopardy claims or the immunity claims of government officials.

There will certainly be situations that require a district court to exercise its discretion in deciding the most appropriate way and time to resolve a question of sovereign immunity. The need for the district court to exercise judgment will be particularly clear where determination of some issue of fact is a predicate to a successful sovereign immunity claim.[25] Until a factual determination necessary to the resolution of the sovereign immunity question is made, a claim of immunity plainly is not ripe for appellate review. We may assume that the district court possesses the inherent discretion to determine whether, for example, a factual issue bearing on immunity is sufficiently distinct from the merits that it can be addressed in a separate hearing, or can best be resolved at trial. Because sovereign immunity "partakes of the nature of a jurisdictional bar" (*see Edelman v. Jordan*, 415 U.S. at 678), however, the presumption ought to be, in every instance, that the district court will resolve the issue as expeditiously as possible, even if a separate fact hearing addressed to the issue may, on occasion, be required.[26]

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[25] Although sovereign immunity typically focuses on a characteristic of the defendant rather than on the facts underlying the particular controversy giving rise to the suit, there may be circumstances where the sovereign immunity question presents factual issues intertwined with the merits. Therefore, there may be situations in which the district court might find it appropriate to reserve decision on the immunity question until after a hearing or even, in rare circumstances, after trial.

In addition, a district court undoubtedly possesses discretion to deny a motion for summary judgment—without making a final determination—if the court finds that the parties' submissions are not sufficient to decide the issue.

Whether such orders would be immediately reviewable is obviously not a question at issue here.

[26] There is no need here to address the question whether denial of a colorable claim of sovereign immunity from damages would be appealable when coupled in the case with a claim for injunctive relief arising out of the same facts. In those circumstances, it would be difficult to argue that disposition of the sovereign immunity question would avoid a trial on the merits.



### C. Sovereign Immunity Is Important

In *Cohen* and *Coopers*, the Court stated that the order being appealed from must resolve an "important issue." *See Cohen*, 337 U.S. at 546; *Coopers*, 437 U.S. at 468. *See also Lauro Lines S.R.L. v. Chasser*, 490 U.S. at 502-03 (Scalia, J., concurring). To the extent there is a separate "importance" requirement—distinct from the importance of the issue to the case and to the individual defendant—it clearly is satisfied in connection with a claim of sovereign immunity. Sovereign immunity has its roots in comity between nations and in the fundamental respect that one government owes another. Within our constitutional system, respect for the sovereignty of the States was retained as part and parcel of the structural fabric of the Union which they formed. Because that sovereign immunity was implicit in the constitutional compact, it is fairly described as "constitutionally secured" or "guaranteed." *E.g., Dellmuth v. Muth*, 491 U.S. at 227-28; *Quern v. Jordan*, 440 U.S. 332, 342 (1979). *See also Blatchford*, 111 S. Ct. at 2585 (immunity is an "essential component of our constitutional structure"); *Pennhurst*, 465 U.S. at 100 (The Court has stressed "that abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,' placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.'") (citation omitted)).[27]

The States' surrender of some of their sovereignty in forming the Union does not detract from the importance of what they retained. Because of the large grant of authority to Congress and to the federal courts, preserva-

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[27] *Cf. Midland*, 489 U.S. at 801 (suggesting that the type of claim, in a criminal case, which can give rise to a right not to stand trial in the *Abney* sense must be of constitutional or clear statutory origin).

tion of state sovereignty within the federal system is a matter of utmost sensitivity. *See Gregory v. Ashcroft*, 111 S. Ct. at 2400. Thus, the State's interest in preserving its constitutional immunity is "important". To the extent that a State's interest in having its claim of sovereign immunity finally resolved before, rather than after, trial can comfortably be accommodated within the framework of the grant of appellate jurisdiction under § 1291, the Court should make that accommodation.[28]

## II. THE ISSUE OF SOVEREIGN IMMUNITY PRESENTED HERE IS SUBSTANTIAL

As demonstrated above, a claim of sovereign immunity easily satisfies the criteria established by this Court for determining whether an appeal of a collateral order will be allowed. Nonetheless, before addressing the appealability of the order denying absolute immunity in *Nixon*, the Court appeared to examine whether the claim presented was "substantial" (specifically, "serious and unsettled") in a jurisdictional sense. 457 U.S. at 742-43. In this case, there is no occasion for this Court to address the "substantiality" of the Authority's immunity claim. It was not relied upon by the court below; it was not squarely presented by the petition; and it is unlikely to be fully addressed by the parties.[29]

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[28] The only factors that arguably militate against the straightforward application of these principles are those that militate against interlocutory appeals generally. There is no question but that interlocutory appeals create a burden on the courts. Nonetheless, where the three-part test is satisfied, and the issue is "important," the Court has made the determination that an appeal should be allowed.

[29] For this Court to consider the merits of the immunity argument in the first instance would place the Court in the position of addressing novel issues of constitutional and statutory law involving the sovereign status of Puerto Rico generally (*see Examining Bd.*, 426 U.S. at 580-97), in connection with a petition that, on its face, presented only a question of statutory appellate jurisdiction. *See generally Yee v. City of Escondido*, 60 U.S.L.W. 4301, 4305 (U.S. Apr. 1, 1992) (declining to reach issues neither "raised or addressed below" or "fairly included in the question" presented).



Moreover, "substantiality" ought not ordinarily to be part of the jurisdictional equation for the courts of appeals. A determination of lack of substantiality, sufficient to warrant dismissal for lack of jurisdiction, necessarily involves a judgment on the substantive merits of the claim. It is anomalous to treat a decisive ruling on the merits as part of the question of jurisdiction.

Insubstantial claims of sovereign immunity can and should be disposed of by the courts of appeals without resort to the notion that the presentation of an insubstantial claim of immunity is a jurisdictional defect. For example, the courts of appeals have developed procedures for the summary disposition of appeals that raise frivolous claims. Similarly, an appeal that is premature because the question of sovereign immunity has not been finally determined by the district court may be dismissed on motion.[30]

Because of the disruption to trial court proceedings wrought by an improperly filed interlocutory appeal, the courts of appeals may be expected to take such motions to dismiss or for summary disposition seriously. The courts of appeals possess the tools to ensure that implausible appeals do not long burden their dockets. On the other hand, because of the disruption to trial court schedules created even by colorable interlocutory appeals, it may be appropriate to afford a calendar priority to all such appeals, irrespective of their "substantiality."

Were the Court to reach the substantiality of the Authority's claim of immunity in this case, it is sufficient to note that this Court has properly recognized that the government established in Puerto Rico in 1900 "is of such a nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Porto Rico v. Rosaly*, 227 U.S. at

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[30] On the other hand, the lack of a colorable basis for the claim may affect the determination whether a notice of appeal divests the district court of jurisdiction.

273. The Court's more recent cases, addressing subsequent statutory development with respect to the Commonwealth of Puerto Rico, have tended to confirm Congress's intention to afford the Commonwealth much the same degree of sovereignty as a State. *See Examining Board*, 426 U.S. at 593-94; *Calero-Toledo*, 416 U.S. at 671-73. Moreover, the First Circuit has long held that Puerto Rico is entitled to "Eleventh Amendment immunity," just as is a State. *See DeLeon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991); *see also Toa Baja Dev. Corp. v. Garcia Santiago*, 312 F. Supp. 899 (D.P.R. 1970) (holding that the Commonwealth's sovereign immunity parallels the immunity of a State).[31] With respect to the Authority's entitlement to share in that immunity, it is sufficient that the Authority is a public corporation, which operates as an "autonomous government instrumentality of the Commonwealth," and which is engaged in "an essential government function." P.R. Laws Ann. tit. 22 § 142. Thus, the Authority's claim is, at a minimum, colorable, and its position as an arm of the Commonwealth should entitle it to the modicum of respect associated with entertaining its appeal on the merits.

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[31] Although the First Circuit has, in dictum, expressed skepticism about the Authority's claim that it shares in the Commonwealth's immunity (*Paul N. Howard Co.*, 744 F.2d at 886), that court has not decided the issue and has not applied to the Authority its most recent formulation for determining the immunity of the Commonwealth's public corporations (*Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034 (1st Cir. 1987)).

We can assume that where a court of appeals has previously decided the question of a particular instrumentality's immunity from suit, then an appeal which does no more than reargue the correctness of the prior holding in the context of a new case—absent some intervening change in the case law or state statute—might be summarily dismissed. That, however, is obviously not the case here.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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May 7, 1992

No. 91-1010



# IN THE
# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1991**

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
*Petitioner,*

v.

METCALF & EDDY, INC.,
*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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**AMICI CURIAE, THE STATES OF OHIO, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MAINE, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, PUERTO RICO, VIRGINIA, AND THE TERRITORY OF GUAM.**

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1991**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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## BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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**AMICI CURIAE, THE STATES OF OHIO, ALABAMA ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MAINE, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, NORTHERN MARIANA ISLANDS, PENNSYLVANIA, PUERTO RICO, VIRGINIA, AND THE TERRITORY OF GUAM.**

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### INTEREST OF THE AMICI CURIAE

The State of Ohio, joined by the states and commonwealths identified above, submits this brief *amici curiae* in support of the petitioner, urging this Court to reverse the holding of the court below. The First Circuit's holding that interlocutory orders disposing of Eleventh Amendment



claims are not immediately appealable under the collateral order doctrine denies states and their agencies immunity from suit in federal court. The states and commonwealths are interested in this Court reaffirming that the Eleventh Amendment immunity is an immunity from trial and addressing the conflict between the First Circuit and six other circuit courts that have held that an immediate appeal is available when a state's assertion of Eleventh Amendment immunity is rejected by a district court. Thus, the states have a significant interest in the practical consequences of the First Circuit's decision which renders the Eleventh Amendment meaningless and results in unrecoverable litigation expenses if the states must go through a trial only to have established on appeal after trial that the states have immunity from lawsuits in federal court.

### STATEMENT OF THE CASE

The facts set forth herein are taken from the First Circuit's decision below. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 945 F.2d 10 (1st Cir. 1991). The Puerto Rico Aqueduct and Sewer Authority (PRASA) was established by the Puerto Rico legislature as "a public corporation and an autonomous government instrumentality" to provide drinking water and sanitary sewage service to the inhabitants of Puerto Rico. 22 L.P.R.A. §§ 142, 144 (1987).

In 1986, PRASA entered into a contract with Metcalf & Eddy, Inc. (Metcalf), an engineering firm, to provide extensive services to bring eighty-three of PRASA's facilities into compliance with federal "clean water" standards. Later, Metcalf and PRASA had contract disputes and in 1990 Metcalf filed a diversity action against PRASA in the United States District Court for the District of Puerto Rico for a declaration of the parties' contractual rights and for $52,000,000 in damages for breach of contract.

PRASA filed in the district court a motion to dismiss based on immunity from suit under the Eleventh Amendment to the United States Constitution. The district court denied the motion to dismiss and ordered PRASA to answer the

complaint. PRASA took an immediate appeal to the First Circuit and requested a stay of the district court proceedings. The First Circuit denied th stay and later dismissed PRASA's appeal for want of federal jurisdiction under 28 U.S.C. § 1291. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 945 F.2d 10 (1st Cir. 1991). Relying upon its earlier decision in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the First Circuit held that the denial of a state's Eleventh Amendment claim of immunity from suit does not confer a right to an immediate appeal. The First Circuit acknowledged that four other circuit courts of appeals have held otherwise.

## SUMMARY OF ARGUMENT

The First Circuit erred in not following a line of Supreme Court cases which lead to the inescapable conclusion that a district court's denial of a state's motion to dismiss premised on Eleventh Amendment grounds is an immediately appealable final collateral order. "[T]his Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (citations omitted). This immunity is a barrier to suit, not simply a bar to liability after trial. The state's Eleventh Amendment immunity from suit is lost if the district court's interlocutory order denying a motion to dismiss based on the Eleventh Amendment is not immediately reviewable as a final collateral order.

This case fully meets the elements set forth in *Cohen v. Beneficial Industrial Loan Commission*, 337 U.S. 541 (1979), for the application of the final collateral order doctrine. Unlike the First Circuit, six circuit courts have found that the *Cohen* doctrine applies to Eleventh Amendment jurisprudence. The reasoning in *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), which the First Circuit relied upon below, is flawed.

For purposes of the *Cohen* doctrine the state's Eleventh Amendment immunity is analogous to the absolute and qualified immunities protecting government officers. These immunities shield the state and its officials with an entitlement not to stand trial. Thus, a state's interest in not being haled



into federal court cannot "be adequately vindicated upon appeal from a final judgment" as the First Circuit concluded.

## ARGUMENT

### I. A DENIAL OF A MOTION TO DISMISS ASSERTING ELEVENTH AMENDMENT IMMUNITY IS AN IMMEDIATELY APPEALABLE FINAL COLLATERAL ORDER SUBJECT TO THIS COURT'S DECISION IN *COHEN V. BENEFICIAL INDUSTRIAL LOAN COMMISSION*.

The First Circuit ruled that a "district court's denial of a [state] government agency's motion to dismiss premised on Eleventh Amendment grounds is not an immediately appealable [collateral] order." *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority*, 945 F.2d 10, 14 (1st Cir. 1991) (footnote omitted). This conclusion was predicated on the lower court's contention that " 'the interests underlying the immunity the Eleventh Amendment provides to the states can be adequately vindicated upon an appeal from a final judgment . . . . ' " *Id.* at 12 (quoting *Libby v. Marshall*, 833 F.2d 402, 407 (1st Cir. 1987)). Both in its conclusion and reasoning, the court below could not have been more mistaken.

Ordinarily, decisions and orders of a district court are not appealable until a "final decision" has been entered. *See* 28 U.S.C. § 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). However, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell*, 472 U.S. at 524. Thus, the Court has identified a class of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Commission*, 337 U.S. 541, 546 (1979).

Three factors must be present for the *Cohen* doctrine to apply. First and most importantly, "the district court's decision [must be] effectively unreviewable on appeal from a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (plurality opinion). One example of a decision that is effectively unreviewable on appeal from a final judgment is one implicating "a . . . defense to liability . . . [that] encompasses a right not to stand trial under . . . specified circumstances." *Mitchell*, 472 U.S. at 550 (Brennan, J., concurring in part and dissenting in part).

The defense at issue, Eleventh Amendment immunity, "encompasses not merely *whether* [a state] may be sued, but *where* it may be sued." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) *("Pennhurst II")*, (emphasis in original). Consequently, "this Court consistently has held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

The concept that the Eleventh Amendment prohibits a state from being sued in federal court is so firmly established even jurists who would limit the circumstances under which the amendment would be applicable recognize it is a barrier to suit, and not merely a barrier to judgment. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 110 S. Ct. 1868, 1875 (1990) (Brennan, J., concurring) ("[T]he Eleventh Amendment secures States only from being haled into federal court . . . where jurisdiction is based on diversity."); *see also Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring in the judgment) ("[B]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered appropriate under certain circumstances."). Only last year, this Court reiterated in unambiguous terms that "a State *will not be subject to suit in federal court* unless it has consented to suit, either expressly or in the 'plan of the [constitutional] convention.' " *Blatchford v. Native Village of Noatak*, ___



U.S. ___ , 111 S. Ct. 2578, 2581 (1991) (emphasis added). *See also Pennhurst II*, 465 U.S. at 99 ("a State may consent to suit against it in federal court").

Once a state is haled into federal court and forced to stand trial the Eleventh Amendment has been subverted. In light of the Court's frequently expressed view that the Eleventh Amendment incorporates immunity from suit in federal court, the district court's order in this case denying the motion to dismiss based on the Eleventh Amendment comfortably satisfies the first requirement of *Cohen* that the decision in question be unreviewable on appeal from a final judgment.

The second *Cohen* factor mandates that an appealable interlocutory decision must "conclusively determine the disputed question." *Mitchell*, 472 U.S. at 527 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Because the necessary consequence of the trial court's rejection of PRASA's assertion of Eleventh Amendment immunity is for the parties to marshal their forces, engage in fullblown discovery, and proceed to trial; the district court's order "finally and conclusively determine[d PRASA's] claim of right not to *stand trial* [in federal court] on the plaintiff's allegations." *Id.* at 527 (emphasis in original). Thus, the second requirement of *Cohen* is satisfied.

Finally, *Cohen* applies if the issue presented involves a " 'clai[m] of right separable from, and collateral to, rights asserted in the action.' " *Mitchell*, 472 U.S. at 527 (quoting *Cohen*, 337 U.S. at 546). Plainly, "a claim of [Eleventh Amendment immunity] is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28.

The preceding analysis is firmly anchored to the language and spirit of this Court's decisions. In addition, every court of appeals to consider the question at hand, with the exception of the First Circuit, has applied the *Cohen* doctrine to Eleventh Amendment jurisprudence. *See Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482

U.S. 906 (1987); *Dube v. State University*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Board of Education*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir. 1989), *cert. denied*, 492 U.S. 976 (1989); *Loya v. Texas Department of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Chrissy F. v. Mississippi Department of Public Welfare*, 925 F.2d 844 (5th Cir. 1991); *Corporate Risk Management Corp. v. Solomon*, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), petition for cert. filed on other grounds sub nom. *Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766); *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, 116 L.Ed.2d 329 (1991); and *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

In contrast, the decision of the court below not to apply *Cohen* to questions of Eleventh Amendment immunity is moored only to precedent from its own circuit, *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987). *Libby* not only stands alone, but is premised on a major misconstruction of the Constitution.

In *Libby*, the First Circuit concluded that "[t]he damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief." *Libby*, 833 F.2d at 406. This interpretation, however, ignores cases such as *Pennhurst II*, in which the Court stated that the Eleventh Amendment prohibits suits against states "regardless of the nature of the relief sought." *Pennhurst II*, 465 U.S. at 100.

The *Libby* court compounded its error of constitutional construction by misapprehending the reasoning underlying the decision in *Ex Parte Young*, 229 U.S. 123 (1908): "[Under] *Ex Parte Young*, a state has 'to stand trial' whenever a *Young* - type case . . . is brought against it." *Libby*, 833 F.2d at 406. Clearly, this statement is inconsistent with the Court's determination that "[a] suit challenging the constitutionality of a state official's action is not one against the State."



*Pennhurst II*, 465 U.S. at 102; *accord Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989). Indeed, this "fiction" of *Ex Parte Young* was made necessary precisely because of the Eleventh Amendment's barrier against haling states into federal court.

An additional failing in *Libby* was the First Circuit's refusal to analogize, for purposes of the *Cohen* doctrine, Eleventh Amendment immunity to the absolute and qualified immunities enjoyed by government officials. This ignores the fact that one of the principal justifications for applying *Cohen* to cases involving assertions of immunity — that is, the effect litigation has on the delivery of government services — is present in regard to cases involving assertions of Eleventh Amendment immunity. Suits against a state and suits against government officials both result in the "distraction of officials from their governmental duties." *Mitchell*, 472 U.S. at 526. There is little if any difference between the role a public official must play in a suit where he is named in his individual capacity and when he is acting as the representative of the state, but is not otherwise named as a party to the litigation. The demands of litigation will, in either instance, require the official to consult with legal counsel, be available for purposes of discovery, and divert his attention from the daily operation of government. The government's investment of time, therefore, is the same whether an official or the state itself is sued.

More importantly, the failure of the court below to analogize Eleventh Amendment immunity to absolute and qualified immunity was based in large measure on that court's mischaracterization of the interest protected by the Eleventh Amendment. For purposes of the *Cohen* doctrine, any distinctions between Eleventh Amendment immunity on one hand, and absolute or qualified immunity of individual state officials on the other, disappear as soon as it is acknowledged that the Eleventh Amendment imbues the states with an entitlement not to stand trial.

If allowed to stand, the lower court's holding prohibiting an immediate appeal from an order denying a motion to

dismiss predicated on the Eleventh Amendment will produce inconsistent and undesirable results. Quite often, a state and its officials will be named as defendants in a federal lawsuit for monetary relief. It is likely that the officials will assert either absolute or qualified immunity and that the state will assert Eleventh Amendment immunity.

If the assertions of immunity made by the officials and the state are rejected by the district court, then, consistent with earlier opinions of the Court, the officials will be able to take an immediate appeal. The state, however, according to the First Circuit's reasoning in this case, will not be permitted to appeal immediately.

If upon appeal the denial of the officials' motion to dismiss is reversed, they will be dropped from the case. The state, on the other hand, will be forced to endure the burdens of a trial despite the fact that any judgment entered against it will be unenforceable.

In the case at bar, the result compelled by the Court's decisions discussed above and the result reached by the First Circuit are diametrically opposed. The Eleventh Amendment cannot simultaneously provide an immunity from suit and, as the First Circuit obviously believes, be nothing more than "a mere defense to liability." *Mitchell*, 472 U.S. at 426-27. The interest affected by a district court order rejecting an assertion of Eleventh Amendment immunity cannot be "effectively unreviewable on appeal from a final judgment," *Mitchell*, 472 U.S. 526-27, and at the same time be "adequately vindicated upon appeal from a final judgment," as the lower court concluded.

The Constitution embodies not only a compact between a government and its people, but an understanding between sovereigns. At the heart of this understanding lies the Eleventh Amendment, which serves as a "fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). The decision below upsets this balance and debases the concept of federalism. It must, therefore, be reversed.



## CONCLUSION

For the preceding reasons, amici curiae urge this Court to reverse the decision of the Court of Appeals for the First Circuit in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority*, 945 F.2d 10 (1st Cir. 1991).

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